TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~388~~ 130

JOHN H. McKEE, DAVID R. GODWIN, BENJAMIN W. HUNTINGTON, AND JOHN P. CADY, PLAINTIFFS IN ERROR,

vs.

M. A. C. RAINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED DECEMBER 9, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 338.

JOHN H. McKEE, DAVID R. GODWIN, BENJAMIN W. HUNTINGTON, AND JOHN P. CADY, PLAINTIFFS IN ERROR,

vs.

M. A. C. RAINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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1 *Writ of error from the U. S. Circuit Court, fifth circuit and district of Louisiana.*

MRS. M. A. C. RAINS, defendant in error,
vs.
J. H. MCKEE *et als.*, plaintiff in error. } No. 5333.

Sullivan, Billings & Hughes for pl'ffs in error, Elmore & King for defendant in error.

Returnable to the Supreme Court of the United States on the first Monday of December, 1868.

Circuit Court of the United States, fifth circuit and district of Louisiana.

MRS. M. A. C. RAINS
vs.
J. H. MCKEE & JOHN P. CADY. } No. 5333.

Transcript from the State Court.—Filed November 4th, 1867.

State of Louisiana, Fifth District Court of New Orleans.

MRS. M. A. C. RAINS
vs.
J. H. MCKEE AND JOHN P. CADY. } No. 16857.

To the honorable the Fifth District Court of New Orleans:

The petition of Mrs. Mary A. C. Rains, widow of the late Cornelius Rains against J. H. McKee, who resides in New Orleans, and John P. Cady, who is at present in this city, respectfully represents:

That for a long time she resided in a certain dwelling-house
2 situated on St. Charles street, No. 207, in this city. That while she was thus residing there in the peaceable possession of her said dwelling and of her property therein, on or about the 19th of November instant, the said J. H. McKee and the said John P. Cady forcibly entered her said dwelling, and by violence and force took into possession a large amount of property, and still retain the same in their possession.

The property thus taken is more particularly described in the annexed list:

Petitioner alleges that after thus enterring and taking her property, they took possession of a great portion of her house by force and violence, and have since kept possession thereof.

The petitioner alleges that at the time the aforementioned acts of violence and force were committed, she informed them that the property they were taking belonged to her, and she warned them to desist from taking her property and possession of her house.

That finding her warnings and protestations untruded, and
3 that they still continued to keep illegal possession of her property and house, on the 20th of the same month, she addressed, through her attorneys, a notice to the said J. H. McKee, of which the annexed is a copy.

Petitioner alleges that notwithstanding the foregoing facts the said defendants still illegally and wrongfully keep possession of her property and house, and that she has in vain repeatedly demanded the restoration of her property and dwelling-house.

Petitioner alleges that the said J. H. McKee acted in the premises through his and deputies from whom he is responsible as well as by his own personal interposition.

Petitioner alleges that in the perpetration of the above-mentioned illegal acts, the defendants were prompted by the most malicious and vendictive motives.

That in order to accomplish the more effectually their unlawful designs and acts as above set forth, the said J. H. McKee who is the United States marshal for this district, falsely pretended that he was acting under process from the United States Circuit Court,
4 both he and the said Cady, well knowing at the time that he had no process whatever that warranted him or them in trespassing upon the premises of the defendant, or forcibly taking her property, or evicting her out of a large portion of her dwelling-house.

Petitioner alleges that she is far advanced in years, feeble and unprotected; the only surviving member of her family being an unmarried daughter who resides with her. That her defendants, after depriving her of her property and her house in the unlawful manner above described, used the opportunity thus described in her own house of outrageously abusing and insulting her and her daughter, of constantly distressing her with false alarms and threats during the day, and at late hours at night, until her life itself became endangered.

Petitioner alleges that her only means of supporting herself was by renting and keeping furnished rooms, and that she was greatly injured in her business by the above-mentioned acts of defendants, and that she will soon, if their wrongs and outrages be continued, be entirely deprived of the means of subsistance.

5 That the property taken by the defendants and mentioned in the annexed list is well worth ten thousand dollars, and would cost her more than that sum to replace it.

That the rent of the portion of the dwelling of which the defendants have taken possession is worth to her a large sum, and is almost indispensible to her successfully carrying on her business.

That the outrages inflicted upon her feelings by the defendants, the injury to her health and the trouble and annoyance they have caused can with difficulty be estimated; but she can safely say she would not have endured the injuries, wrong and outrages perpetrated upon her by the defendants for the sum of fifty thousand dollars, and she claims that sum as the amount the defendants justly owe her for the damages they have caused.

That the defendants are joint trespassers and liable to her in solido.

Wherefore petitioner prays that after due proceedings had, the defendants be condemned in solido to pay her in the said sum of fifty thou-

sand dollars and costs, and for all other relief, &c. &c., and for a trial by jury.

(Signed.) ELMORE & KING.
6 And JAS. H. VAN DALSON,
Att'ys for Pl'ff.

Letter annexed to petition.—Filed 26th November, 1866.

J. H. McKee, esq'r.,

DEAR SIR: We have been informed by Mrs. M. A. C. Rains, widow of the late Cornelius Rains, that on yesterday, you and one John P. Cady, forcibly entered her dwelling-house. on St. Charles street, and took possession of a large amount of property belonging to her. That you also took forcibly possession of a large portion of her dwelling-house, which you still forcibly retain; thereby evicting her out of her own domicil.

That in thus acting she regards you both as trespasser, and will hold you responsible.

She further informs us that in taking possession of her house and keeping it as you now are doing, that every hour is an additional trespass, by which she is greatly damaged; on yesterday
7 through her attorneys-at-law, she notified you of the above fact, and she now repeats the notice in writing.

Respectfully yours, &c.,

(Signed) ELMORE & KING,
Attorneys for Mrs. Rains.

The above is a copy of a letter hand by me to a deputy marshal, in the marshal's office, addressed to J. H. McKee, esq'r, U. S. marshal, this day, Nov'r 20, 1866.

(Signed) W. W. KING.

List of the property forcibly taken by J. H. McKee, from Mrs. M. A. C. Rains, while in her possession in her house, annexed to petition.—Filed 26 Nov'r, 1866.

Property in the hall: 1 hat rack, 2 chairs, carpet on the floor, 2 rugs, 1 old hat rack, 1 table and cover, a lot of carpeting stored in hall, 1 old rug, gas chandelier.

In sitting room: 1 settie, 2 rocking-chairs, 2 small tables, 1
8 what-not or etagere, 1 clock, 1 marble top table, 5 pictures, 1 looking glass, 2 window shades, 1 gas chandelier, carpet on floor, 1 gaz extension.

In dining room: 1 large extension table, 1 safe, 1 side board, 10 chairs, 1 plated pitcher, 1 lot of glass ware, 1 small table, 1 gas chandelier, 2 window shades.

In closet: 1 set of china, very valuable, 1 lot of dishes and glass-ware.

In wash room: 1 small stove-pipe.

In stable or barn: 1 refrigerator, 1 copper coal scuttle, 1 harness closet, 1 water filter, 2 shovels.

In the parlor: 4 sofas, 20 chairs, 2 side tables, 2 mirrors, 2 gas chandeliers, 1 secretary and book-case, Lot of books, 2 window shades, 4 window cornices, 1 card stand, 2 china vases,
9 2 shovel stands, 1 stair carpet and roll.

Bed-room No. 1: 1 rosewood bedstead and mattrass, 1 mahogany armoir with mirror, 1 rosewood armoir with mirror; 1 side-table, top and looking glass, 1 settee, 1 rosewood washstand, 1 carpet on floor.

In front bed-room: 1 bedsted, mattrass, bolster, pillows and bed clothing, 1 large armoir with looking-glass, 1 bureau, 1 sofa, 1 washstand, 2 rocking-chairs, 3 chairs, 1 rug and carpet on the floor, 1 china chamber set, 1 spittoon, 1 towell rack.

In room next to front room: 1 rosewood bedstead and mattrass, 1 rosewood bureau, 1 rosewood armoir with mirror doors, 1 rosewood washstand, marble top, and china set., 1 settee or small sofa, 1 carpet and rug on floor, 1 towell rack, 2 chairs.

10 Room on gallery: 1 bedstead and mattrass, 1 marble top washstand and pitcher, 1 table.

In room on gallery adjoining: 1 cottage walnut bedstead, 1 armoir, 1 table, 1 chair.

In nursery, 1 cottage bedstead and bedding, 1 armoir, 1 small bedstead, 1 rosewood table, 1 towell rack.

In 3d floor bed-room: 1 bedstead, mattrass, bolster, pillows and bedding, 1 bureau, 1 sofa, two chairs, carpet on the floor, 2 rugs, 1 washstand, 1 spittoon, 1 towell rack.

In 2d room 3d floor: 1 bedstead, mattrass, bolster, pillows and bedding, 1 spittoon, 1 carpet on the floor, 1 chair, 1 walnut bureau with looking-glass.

Galery bed-room 3d floor: 1 bedstead and bedding, 1 bureau,
11 1 washstand and bowl, and pitcher, carpet on floor.

Room-gallery, 3rd floor: 1 bureau, bedstead and bedding, carpet on the floor, washstand.

In front hall, room 3d floor: 1 bureau, 1 china bowl and pitcher, 1 chair.

In hall, 3d floor: 2 cedar chests and contents.

Last room, 3d floor: 1 bedstead, 2 mattrasses, 2 dressing tables, 1 chair, 1 washboard and pitcher, and fire scrum, 1 coal scuttle.

Silverware: I dozen forks, castors, 1 doz. table spoons, 1 mustard spoon, 1 sugar spoon, 1 butter knife, 1 doz. tea spoons.

Fifth District Court of New Orleans.

Answer of J. H. McKee.—Filed 8th December, 1866.

MRS. MARY A. C. RAINS, WIDOW, &C.
vs.
J. H. MCKEE, U. S. MARSHAL. } No. 16857.

12 And now into this honrable court comes J. H. McKee, United States marshal, and for answer to plaintiff's petition,

says that he denies each and every allegation in plaintiff's petition contained, except as in hereinafter admitted.

And further answering says, that on or about the nineteenth day of November, eighteen hundred and sixty-six, under and by virtue of a certain execution directed to him by the honorable the United States Circuit Court, as marshal of said court, he seized the household property of defendant John P. Cady, in a certain suit in said court, being numbered 3609 in docket of said court, and in which Buchanan & Co. are plaintiffs, and John P. Cady is defendant, and further says that said property was subject to seizure and sale under said execution.

Wherefore he prays that plaintiff's petition may be dissolved with costs.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Atty's of J. H McKee, United States marshal.

13 Fifth District Court of New Orleans.

Answer of John P. Cady.—Filed 10th December, 1866.

MISTRESS M. A. C. RAINS
against
J. H. McKEE AND JOHN P. CADY. } No. 16857.

And now into this honorable court comes the defendant, John P. Cady, and for answer to the plaintiff's petition denies each and every allegation in said petition contained.

Wherefore defendant prays that said petition may be rejected and he may be hence dismissed with his costs.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Of counsel for Cady.

Supplemental petition.—Filed 11th December, 1866.

To the honorable the fifth District Court of New Orleans:

In the suit of Mrs. Mary A. C. Rains, widow of the late Col. Cornelius Rains, against J. H. McKee and John P. Cady, now pending in this h'ble court, after due permission obtained, the plaintiff files this supplemental petition in which she alleges that in giving
14 the list of articles illegally taken by the defendants, she omitted one feather bed and bedding, for which she hereby claims damages.

She further alleges that in taking said property mentioned in the original petition and in this supplemental petition, as well as in trespassing upon the property and dwelling-house of the plaintiff, and evicting her therefrom, the J. H. McKee was acting under color of his office as United States marshal; that he abused his office for the purpose of perpetrating the outrages and trespasses complained of by plaintiff; that in so doing he violated his duty as United States marshal, and did not faithfully perform the duties of marshal.

Petitioner alleges that B. W. Huntington and David S. Godwin are the sureties of the said J. H. McKee, as marshal for the United States for the district of Louisiana, as more fully appears from the annexed duly certified copy of his official bond.

That they each became bound in solido as sureties on said bond for the sum of twenty thousand dollars in solido.

That they are liable on the said bond as sureties for the
15 acts complained of by the plaintiff, in violation of his duty.

That she has the right to sue them for the damages she has sustained under the circumstances heretofore set forth.

Wherefore she prays that the said Huntington and the said Godwin be made parties to this proceeding; that they be served with copies of the original petition and this supplemental petition, and be required to answer the same; and that after all due proceedings had, they be condemned, each one of them as sureties of said J. H. McKee, to pay the plaintiff twenty thousand dollars, and as heretofore prayed that there be judgment against the said J. H. McKee for the sum of fifty thousand dollars, and for the like sum against John P. Cady, and for all other relief in the premises, &c., &c.

(Signed) ELMORE & KING, *Att'ys for Pl'ff.*

Order annexed to supplemental petition.—Filed 11 *Dec.* 1866.

Let this supplemental petition be filed as within prayed for and according to law.

(Signed) CHAS. LEAUMONT, *Judge.*

New Orleans, December 10th, 1866.

16 *Bond annexed to supplemental petition.—Filed* 11*th December,* 1866.

Know all men by these presents, that we, John H. McKee, as principal, and Benjamin W. Huntington and David R. Godwin, as sureties, severally of the parish of Orleans in the State of Louisiana, inhabitants and freeholders in said State and district, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the United States, to be paid to the said United States, for which payment well and truly to be made, we bind our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this 12th day of November, 1866.

The condition of the above obligation is such, whereas the President of the United States hath pursuant to law appointed the said John H. McKee to be marshal of the United States for the district of Louisiana, to have and to hold the same, with all the rights,
17 privileges and emoluments thereunto lawfully appertaining, for four years from the 24th day of October, 1866, unless sooner removed therefrom, as by a commission to him, bearing date the said 24th day of October, 1866, more fully appears:

Now if the said John H. McKee, by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal, then this obligation to be void, otherwise to remain in full force and virtue.

[s.] (Signed) J. H. McKEE.
[s.] (Signed) B. W. HUNTINGTON.
[s.] (Signed) DAVID R. GODWIN.

STATE OF LOUISIANA, *Parish of Orleans, ss*:

On this 12th day of November, A. D. 1866, personally appeared the within-named, John H. McKee, Benjamin W. Huntington and David R. Godwin, before me, Edward H. Durell, district judge for the district of Louisiana, and severally acknowledged that they executed the within bond; and the said Benjamin W. Huntington and David R. Godwin being duly sworn, did depose and say, each for himself, that he is an inhabitant and freeholder within said
18 district, and that he is worth the sum of twenty thousand dollars over and above all his debts and liabilities.

(Signed) B. W. HUNTINGTON.
(Signed) DAVID R. GODWIN.

Sworn and subscribed this 12th day of Nov'r, 1866.
(Signed) E. H. DURELL, *Judge.*

I do approve of the within bond of J. H. McKee, given as U. S. marshal for the district of Louisiana.
November 12, 1866.
(Signed) E. H. DURELL, *Judge.*

Circuit Court of the United States 5th circuit and district of Louisiana.

CLERK'S OFFICE.

I certify the foregoing to be a true copy of the original of record and on file in this office.
New Orleans, December 5th, 1866.
(Signed) CHS. CLAIBORNE, *Clerk.*

Fifth District Court of New Orleans.

Amended answer of J. H. McKee.—Filed 14th December, 1866.

19 MISTRESS M. A. C. RAINS, WIDOW, &C., *against* J. H. McKEE, U. S. MARSHAL. } No. 16857.

And now comes into this honorable court J. H. McKee, United States marshal, and for answer to plaintiff's petition says that he denies each and every allegation in plaintiff's petition contained, except as is hereinafter admitted.

Petitioner alleges that B. W. Huntington and David S. Godwin are the sureties of the said J. H. McKee, as marshal for the United States for the district of Louisiana, as more fully appears from the annexed duly certified copy of his official bond.

That they each became bound in solido as sureties on said bond for the sum of twenty thousand dollars in solido.

That they are liable on the said bond as sureties for the
15 acts complained of by the plaintiff, in violation of his duty.

That she has the right to sue them for the damages she has sustained under the circumstances heretofore set forth.

Wherefore she prays that the said Huntington and the said Godwin be made parties to this proceeding; that they be served with copies of the original petition and this supplemental petition, and be required to answer the same; and that after all due proceedings had, they be condemned, each one of them as sureties of said J. H. McKee, to pay the plaintiff twenty thousand dollars, and as heretofore prayed that there be judgment against the said J. H. McKee for the sum of fifty thousand dollars, and for the like sum against John P. Cady, and for all other relief in the premises, &c., &c.

(Signed) ELMORE & KING, *Att'ys for Pl'ff.*

Order annexed to supplemental petition.—Filed 11 *Dec.* 1866.

Let this supplemental petition be filed as within prayed for and according to law.

(Signed) CHAS. LEAUMONT, *Judge.*

New Orleans, December 10th, 1866.

16 *Bond annexed to supplemental petition.—Filed* 11*th December,* 1866.

Know all men by these presents, that we, John H. McKee, as principal, and Benjamin W. Huntington and David R. Godwin, as sureties, severally of the parish of Orleans in the State of Louisiana, inhabitants and freeholders in said State and district, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the United States, to be paid to the said United States, for which payment well and truly to be made, we bind our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this 12th day of November, 1866.

The condition of the above obligation is such, whereas the President of the United States hath pursuant to law appointed the said John H. McKee to be marshal of the United States for the district of Louisiana, to have and to hold the same, with all the rights,
17 privileges and emoluments thereunto lawfully appertaining, for four years from the 24th day of October, 1866, unless sooner removed therefrom, as by a commission to him, bearing date the said 24th day of October, 1866, more fully appears:

Now if the said John H. McKee, by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal, then this obligation to be void, otherwise to remain in full force and virtue.

[s.] (Signed) J. H. McKEE.
[s.] (Signed) B. W. HUNTINGTON.
[s.] (Signed) DAVID R. GODWIN.

STATE OF LOUISIANA, *Parish of Orleans, ss:*

On this 12th day of November, A. D. 1866, personally appeared the within-named, John H. McKee, Benjamin W. Huntington and David R. Godwin, before me, Edward H. Durell, district judge for the district of Louisiana, and severally acknowledged that they executed the within bond; and the said Benjamin W. Huntington and David R. Godwin being duly sworn, did depose and say, each for himself, that he is an inhabitant and freeholder within said
18 district, and that he is worth the sum of twenty thousand dollars over and above all his debts and liabilities.

(Signed) B. W. HUNTINGTON.
(Signed) DAVID R. GODWIN.

Sworn and subscribed this 12th day of Nov'r, 1866.
(Signed) E. H. DURELL, *Judge.*

I do approve of the within bond of J. H. McKee, given as U. S. marshal for the district of Louisiana.
November 12, 1866.
(Signed) E. H. DURELL, *Judge.*

Circuit Court of the United States 5th circuit and district of Louisiana.

CLERK'S OFFICE.

I certify the foregoing to be a true copy of the original of record and on file in this office.
New Orleans, December 5th, 1866.
(Signed) CHS. CLAIBORNE, *Clerk.*

Fifth District Court of New Orleans.

Amended answer of J. H. McKee.—Filed 14th December, 1866.

19 MISTRESS M. A. C. RAINS, WIDOW, &C., *against* J. H. McKEE, U. S. MARSHAL. } No. 16857.

And now comes into this honorable court J. H. McKee, United States marshal, and for answer to plaintiff's petition says that he denies each and every allegation in plaintiff's petition contained, except as is hereinafter admitted.

And further answering says, that on or about the nineteenth day of November, eighteen hundred and sixty-six, under and by virtue of a certain execution directed to him by the honorable the United States Circuit Court, fifth circuit, as marshal of said court, he seized the household property of defendant, Cady, in a certain suit in said court, being numbered 3609, in the docket of said court, and in which Buchanan & Company are plaintiffs, and John P. Cady is defendant; and further says that said property was the property of said John P. Cady and was subject to seizure and sale under said execution.

Wherefore he prays that plaintiff's petition may be dismissed with costs.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Att'ys for J. H. McKee.

Fifth District Court of New Orleans.

Answer of defendants Huntington and Godwin.—Filed January 10th, 1867.

MRS. MARY A. C. RAINS
vs.
JOHN C. MCKEE AND OTHERS.

And now into court come B. W. Huntington and David S. Godwin, made defendants herein, and for answer to the petition of plaintiff herein adopt all the admissions, denials and averments made by the defendant, John H. McKee, in his answer to the supplemental petition this day filed herein.

Wherefore they pray that the prayer of plaintiff's petition may be rejected and that these defendants may have judgment for their costs.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Attorneys for defendants Huntington & Godwin.

21 *Answer of defendant J. H. McKee.—Filed Jan'y 10th,* 1867.

MRS. M. A. C. RAINS
vs.
JOHN H. MCKEE AND OTHERS.

And now into this honorable court came J. H. McKee, and for answer to the supplemental petition of the plaintiff denies each and every allegation in said petition contained, except as is hereinafter admitted.

He admits the execution of the official bond by himself and defendant's sureties, B. W. Huntington and Daniel S. Godwin, made defendants herein.

He avers that he is, and at and during the time mentioned in said petition, and supplemental petition, he was United States marshal for the district of Louisiana.

That as such marshal he received a writ of fieri facias which was

duly issued out of the Circuit Court of the United States for the 5th judicial circuit, holding the sessions in the district of Louisiana, in a certain suit numbered 3609 upon the docket of said court, wherein Buchanan & Co. are plaintiffs, and John P. Cady is defendant, whereby he was commanded to make out of the goods and estate of said Cady the sum of $3,841 98, and upwards.

22 That under and by virtue of said writ he rightfully seized and sold the property mentioned in said petition, and supplemental petition, which was the property of the said Cady, defendant in said writ, and was subject to seizure and sale under the same.

Therefore this defendant prays that the prayer of the petitioner may be rejected, and that the defendant may have judgment for his costs.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Attorneys for Defendant, J. H. McKee.

Fifth District Court.

Petition for removal to the United States Circuit Court.—Filed 13th January, 1867.

MRS. M. A. C. RAINS
vs.
JOHN H. MCKEE *et als.* } No. 16857.

To the honorable Charles Leaumont, judge of the Fifth District Court of New Orleans:

The petition of John H. McKee, David R. Godwin, Benjamin Huntington, and John P. Cady, respectfully shows and states,

23 that a civil suit has been commenced against them in this honorable court, wherein Mrs. Mary A. C. Rains is plaintiff and they are defendants, numbered on the docket of said court, for wrongs alleged to have been done and committed on the 10th November, 1866, by one of your petitioners, namely, John H. McKee, by virtue of and under acts of Congress, to wit: The acts creating and regulating the office and official duties of the United States marshal for the district of Louisiana.

Reference being herein made to the petition and supplemental petition, that judgment was on the day of May, A. D. 1867, rendered against your petitioners in solido for the sum of seven thousand five hundred dollars ($7,500) besides the costs.

And your petitioners further state that in said court and suit the said plaintiff demanded a trial by jury, and that said suit was tried by a jury; and that in said trial before said jury your petitioners, as they are informed and believe, did not have full and equal benefit of the laws and proceedings for the security of property by

24 reason of the prejudice on the part of said jury, and of the jurors in said court, against the official characters of the said John H. McKee, United States marshal as aforesaid, and the connection of your other petitioners therewith; that this grievance is of such a nature that it cannot be corrected or prevented, either by the

judge presiding over said court or by the Supreme Court of Louisiana, on a review of said case. That your petitioners have, by reason of the facts above set forth, been denied, and cannot enforce in the said tribunal, the rights guaranteed to them under and by virtue of the act of Congress framed April 9th, 1866, entitled an "Act to protect all persons in the United States in their civil rights and furnish the means of their vindication."

And for the several reasons herein before assigned, the annexed affidavits being considered, your petitioners pray that said suit may be removed for trial to the next Circuit Court of the United States, to be holden in the district of Louisiana.

(Signed) JOHN P. CADY.

Sworn to and subscribed before me this 6th day of June, 1867.
(Signed) G. H. BRAUGHN
25 *2d Justice of the Peace.*

Sworn to and subscribed before me this 7th day of June, 1867.
(Signed) G. H. BRAUGHN,
2d Justice of the Peace.

(Signed) B. W. HUNTINGTON.
(Signed) J. H. McKEE.

Sworn to and subscribed before me this 7th of June, 1867.
(Signed) G. H. BRAUGHN,
2d Justice of the Peace.

(Signed) DAVID R. GODWIN.

Sworn to and subscribed before me this 7th day of June, 1867.
(Signed) G. H. BRAUGHN,
2d Justice of the Peace.

Fifth District Court.

Supplemental answer.—Filed January 19, 1867.

MRS. MARY A. C. RAINS *vs.* J. H. McKEE *et als.* } No. 16857.

And now into this honorable court comes J. H. McKee, B. W. Huntington and David R. Godwin, and for a supplemental answer to plaintiff's petition, say they adopt their previous answers
26 made herein.

And further answering, allege, that whatever claim the plaintiff had or has to the property named in the plaintiff's petition, was derived under a transfer which was simulated, fraudulent and designed to hinder, delay, defeat and defraud the creditors of John

P. Cady, and that said transfer was made without any lawful or valid consideration.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Of counsel for McKee, Huntington & Godwin.

Order annexed to supplemental answer.—Filed January 19, 1867.

Let this supplemental answer be filed as within prayed for, and according to law.

New Orleans, January 19, 1867.

(Signed) CHAS. LEAUMONT, *Judge.*

Verdict of the jury.—Filed May 31*st*, 1867.

We, the jury, find a verdict in favor of plaintiff and against defendants for seven thousand five hundred dollars, in solido, with costs.

27 New Orleans, May 31st, 1867.

(Signed) EDW. MONTGOMERY,
Foreman.

Judgment.

MRS. M. A. C. RAINS
vs.
J. H. MCKEE AND
John P. Cady. } No. 16857.

In this case the court considering the verdict of the jury, the same being in due form of law:

It is ordered and adjudged that plaintiff, Mrs. Mary A. C. Rains, widow of the late Cornelius Rains, recover of defendant, P. H. McKee, marshal of the United States for the district of Louisiana, of B. W. Huntington and David R. Godwin, his sureties, and of defendant, John P. Cady, in solido, the sum of seven thousand five hundred dollars and costs of suit.

Judgment rendered May 31st, 1867.

Ditto, signed June 5th, 1867.

(Signed) CHAS. LEAUMONT, *Judge.*

Fifth District Court of New Orleans.

Transcript from the State Court.—Filed Nov. 4, 1867. *Petition. Filed* 26*th November*, 1866.

28 MISS LOUISA M. RAINS
vs.
J. H. MCKEE. } No. 16858.

STATE OF LOUISIANA:

To the honorable the Fifth District Court of New Orleans:

The petition of Louise M. Rains, who resides in New Orleans, against P. H. McKee, who also resides in New Orleans, respectfully represents:

That for many years she has owned and possessed a very valuable

piano; that on or about the 19th instant, while the said piano was in her peaceable possession, the defendant forcibly entered the house where she resided, and where she kept the said piano, and took by force and violence said piano into his possession; that at the time he thus took the piano he was informed that it belonged to the petitioner, and that he had no right to take it.

Regardless of her remonstrances, he persisted in depriving her of said property.

That on or about the 24th day of November instant she addressed a note to the defendant, of which the annexed is a copy:

29 That notwithstanding the verbal and written notices and remonstrances above mentioned, the said defendant still retains possession of the said piano.

Petitioner alleges that, besides the loss of the piano, she has been greatly injured in feelings and has been put to heavy expense and trouble by the trespass of defendant, as above described. That she has suffered damages thereby to the amount of fifteen hundred dollars, which the defendant refuses to pay.

Wherefore she prays, that after all due proceedings had, that the defendant be condemned to pay her the said sum of fifteen hundred dollars and costs, and for all other relief, &c., &c.

(Signed) ELMORE & KING.

Note annexed to petition.—Filed 26th November, 1866.

J. H. McKee, Esq., U. S. Marshal:

DEAR SIR: On or about the 19th inst., you, by force and violence, entered the premises where I resided, seized and took possession of a piano belonging to me. You were informed at the time you took possession of the piano that it was mine. I now repeat in writing that fact, and notify you that I shall sue you for damages for your illegal seizure and trespass.

30

Respectfully yours,

(Signed) L. M. RAINS.

New Orleans, November 24, 1866.

Endorsed: The within is a correct copy of the note which I this day delivered to the U. S. Marshal. (Signed) Manly Holmes. New Orleans, November 24, 1866.

Fifth District Court of New Orleans.

Answer of defendant.—Filed 8th December, 1866.

MISS LOUISA M. RAINS
vs.
J. H. MCKEE. } No. 16858.

And now into this honorable court comes J. H. McKee, through his attorneys, Sullivan, Billings & Hughes, and for answer to plain-

tiff's petition, says that he denies each and every allegation
31 in plaintiff's petition contained, except as is hereinafter specially admitted.

And further answering, he admits that he seized, as United States marshall, a certain piano on the premises number two hundred and eight St. Charles street, on or about the nineteenth day of November, eighteen hundred and sixty-six, under and by virtue of a certain execution issued by the honorable the United States Circuit Court sitting in the district of Louisiana, in a certain suit numbered 3609 on the docket of said court, and in which Buchanan & Co. are plaintiffs and John P. Cady is defendant, as the property of the said John P. Cady, which was by said defendant pointed out as his property, and the said J. H. McKee says that the said piano was the property of said Cady, and as such was liable to seizure and sale under said execution.

Wherefore said J. H. McKee, United States marshal, prays judgment of this hon'ble court that said piano may be decreed to have been the property of said John P. Cady, and as such was liable to the seizure made by him, and that the plaintiff's petition be
32 dismissed with costs, and that such other decree may be made in the premises as justice and law may dictate.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Att'ys for J. H. McKee, U. S. Marshal.

Fifth District Court of New Orleans.

Answer to petition by defendant.—Filed January 10th, 1867.

MISS LOUISA M. RAINS
vs.
JOHN H. McKEE & others. } No. 16858.

And now into this hon'ble court comes J. H. McKee, and for answer to the supplemental petition of the plaintiff, denies each and every allegation in said petition contained, except as is hereinafter admitted.

He admits the execution of the official bond by himself and defendant's sureties, B. W. Huntington and David S. Godwin, made defendants herein.

He avers that he is, and at and during the times mentioned in said petition and supplemental petition he was, United States marshal for the district of Louisiana; that as such marshal he received a
33 writ of fieri facias, which was duly issued out of the Circuit Court of the United States for the 5th judicial circuit, holding its sessions in the district of Louisiana, in a certain suit numbered "3609" upon the docket of said court, wherein Buchanan & Co. are plaintiffs and John P. Cady is defendant, whereby he was commanded to make out of the goods and estate of the said Cady the sum of .

That under and by virtue of said writ, he rightfully seized and sold the property mentioned in said petition and supplemental

petition, which was the property of the said Cady, defendant in said writ, and was subject to seizure and sale under the same.

Therefore this defendant prays that the prayer of the petitioner may be rejected, and that this defendant may have judgment for his costs.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Att'ys for Def't J. H. McKee.

Fifth District Court of New Orleans.

34 *Answer of defendants, Huntington & Godwin.—Filed January 10, 1867.*

MISS LOUISA M. RAINS
vs.
JOHN H. MCKEE & OTHERS.

And now into this honorable court come B. W. Huntington and D. S. Godwin, made defendants herein, and for answer to the petition of the plaintiff herein adopt all the admissions, denials and averments made by defendant, John H. McKee, in his answer to the supplemental petition this day filed herein.

Wherefore they pray that the prayer of plaintiff's petition may be rejected, and that these defendants may have judgment for their costs.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Att'ys for Deft's Huntington and Godwin.

Fifth District Court of New Orleans.

Supplemental answer of McKee, Huntington and Godwin.—Filed Jannary 19, 1867.

MISS LOUISA M. RAINS
vs.
JOHN H. MCKEE AND JOHN P. CADY.

And now, into this hon'ble court, come J. H. McKee, B. W. Huntington, David S. Godwin, and for a supplemental answer say:

That they adopt their previous answers made herein, and
35 answering further say, that whatever claim the plaintiff had or has to the property set forth in her petition, is under a transfer from John P. Cady, which was simulated, fraudulent and designed to hinder, delay and defraud the creditors of said Cady, and said transfer was made without lawful consideration.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Of counsel for J. H. McKee, B. W. Huntington & D. S. Godwin.

Order.

Let this supplemental answer be filed as within prayed for and according to law.

New Orleans, January 19, 2867.

(Signed) CHAS. LEAUMONT, *Judge.*

Fifth District Court of New Orleans.

Petition for removal to the United States Circuit Court.—Filed 13 *January*, 1867.

MISS LOUISE M. RAINS
vs
JOHN H. MCKEE *& als.* } No. 16858.

To the honorable Charles Leaumont, judge of the fifth District Court of New Orleans:

36 The petition of John H. KcKee, David R. Godwin, Benjamin Huntington and John P. Cady, respectfully shows and states, that a civil suit has been commenced against them in this honorable court, wherein Miss Louise P. Rains is plaintiff, and they are defendants, numbered on the docket of the said court for wrongs alleged to have been done and committed on November 19th, 1866, by one of your petitioners, namely, John H. McKee, by virtue and under acts of Congress, to wit: The acts creating and regulating the office and official duties of the United States marshal for the district of Louisiana.

Reference being herein made to the petition and supplemental petition in said suit, which are made part of this petition, that judgment was on the day of May, A. D. 1867, rendered against your petitioners in solido for the sum of one thousand dollars, ($1,000,) besides the costs.

And your petitioners further state that in said court and suit, the said plaintiff demanded a trial by jury, and that said suit was
37 tried by a jury, and that in this said trial, before said jury, your petitioners, as they are informed and as they believe, did not have the full and equal benefit of the laws and proceedings for the security of property by reason of the prejudice, on the part of said jury, and of the jurors in said court against the official character of said John H. McKee, United States marshal as aforesaid, and the connection of your other petitioners therewith; and that this grievance is of such a nature that it cannot be corrected or presented either by the judge presiding over said court or by the Supreme Court of Louisiana, on a review of said case; that your petitioners have by reason of the facts above set forth been denied, and cannot enforce in the said tribunal the rights guaranteed to them under and by virtue of the act of Congress, framed April 9th, 1866, entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication."

And for the several reasons hereinbefore assigned, the annexed affidavits being considered, your petitioners pray that said suit may be removed for trial to the next Circuit Court of the United
38 States, to be holden in the district of Louisiana.

(Signed) JOHN P. CADY.

Sworn to and subscribed before we this 6th day of June, 1867.
(Signed) G. H. BRAUGHN,
2nd Justice of the Peace.

(Signed) B. W. HUNTINGTON.

Sworn to and subscribed before be this 7th of June, 1867.
(Signed) G. H. BRAUGHN,
2nd Justice of the Peace.

(Signed) J. H. McKEE.

Sworn to and subscribed before me this 7th of June, 1867.
(Signed) G. H. BRAUGHN,
2nd Justice of the Peace.

(Signed) DAVID R. GODWIN.

Sworn to and subscribed before me this 7th of June, 1867.
(Signed) G. H. BRAUGHN,
2nd Justice of the Peace.

Fifth District Court of New Orleans.

39 MISS LOUISE M. RAINS *vs.* JOHN H. McKEE AND OTHERS. } No. 16858.

MRS. M. A. C. RAINS *vs.* JOHN H. McKEE AND OTHERS. } No. 16857.

Rule filed 13th June, 1867.

On filing the petitions and affidavits of the defendants herein, it is ordered that the plaintiffs show cause before this court on Tuesday the 25th of June, A. D. 1867, at 11 o'clock a. m. why the prayer of said petitioners should not be granted and why said suits should not be removed to the Circuit Court of United States for the fifth judicial circuit holding its sessions in the district of Louisiana.

Objections of plaintiffs to removal—Filed 25 June, 1867.

Fifth District Court of New Orleans.

MISS LOUISA M. RAINS
vs.
J. H. McKEE. } No. 16858.

MRS. M. A. C. RAINS
vs.
J. H. McKEE. } No. 16857.

To the rule taken against the plaintiffs in the above two suits to show cause why the said cases should not be removed to the
40 Circuit Court of the United States for the fifth judicial circuit holding sessions in the district of Louisiana. The said plaintiffs object to the removal of said causes upon the following grounds, to wit :

1st. The petition and affidavit for the removal are insufficient.

The petition which is sworn to is inconsistent and contradictory upon its face. The facts stated do not in law warrant or authorize the logical conclusions drawn from them.

The facts set forth in the petition do not in law authorize the removal of the cause as prayed for.

2d. The petition for removal is based upon the act of Congress, April 9th, 1866, entitled "An act to protect all persons in the United States in their civil rights and furnish the means of their vindication."

The petition does not set forth as the law requires, the civil right of which the defendants have been deprived. It does not allege that the defendants have been deprived of any right on account of any previous condition of slavery or involuntary servitude.
41 That they have been denied any rights on account of their color, or that they have not enjoyed the same rights as are enjoyed by white citizens—each and all of which are essential obligations under the said law to entitle a party to a removal of a cause from a State court to the Circuit Court of the United States

3d. Under the said acts of Congress of April 9th, 1866, a party cannot remove a cause from a State court to the United States Circuit Court after a trial and final judgment has been entered in the cause, in the manner sought to be done in this case, or in any other manner.

4th. The plaintiffs in their respective petitions against J. H. McKee and others, did not complain of his having done wrongs by virtue of or under acts of Congress, to wit, the acts creating and regulating the office and official duties of the United States marshal for the district of Louisiana, as will be seen by reference to the said petitions, which are made a part of the petition for this application.

The said McKee and the other defendants in their respec-
42 tive answers did not set up or pretend in their answers, that

they or any of them were protected by virtue of or under any act of Congress.

The action brought by the respective plaintiffs was for a trespass upon their property. The real defence set up by McKee and Godwin and Huntington was that no trespass had been committed, because the property upon which the trespass was alleged to have be committed was not the property of the respective plaintiffs, but the property of John P. Cady, and was rightfully taken possession of by the said McKee.

That the conveyance of the property from Cady to Mrs. Rains was simulated and made to defraud the creditors of Cady.

Cady himself plead simply a general denial. No law whatever of Congress was referred to as the basis of these defences. None could be, for it is manifest there is no law of Congress which could be applicable to these issues. The plaintiffs controverted no right which was claimed to be exercised under any law of Congress, nor did they dispute any right which McKee claimed to exercise in the
43 performance of his official duties as United States marshal. He did not pretend that he had the right as United States marshal to seize the property of Mrs. Rains on any writ in his hands, or that he had any writ directing him to seize that particular property. These facts are apparent from a mere inspection of the pleadings which are made a part of the petition and affidavits for this application. Upon the face of these papers the petition for the removal ought not to be granted on the grounds stated in it.

5th. The United States Circuit Court has no jurisdiction of the case pretended by the pleadings; neither of the subject-matter as pretended, nor on account of the citizenship of the parties. A cause should not be removed to a court which has no jurisdiction to try it.

6th. For these and other reasons to be assigned orally, the application to remove this cause to the United States Circuit Court ought to be refused.

(Signed) ELMORE & KING,
Att'ys for Pl'ff.

Fifth District Court of New Orleans.

MISS LOUISE M. RAINS
vs.
44 J. H. MCKEE. } No. 16858.

Verdict of the jury.—Filed May 31st, 1867.

We, the jury, find a verdict in favor of plaintiff for the sum of one thousand dollars with costs.

New Orleans, May 31st, 1867.

(Signed) EDW. MONTGOMERY,
Foreman.

Judgment.—Filed 31st May, 1867.

In this case the court considering the verdict of the jury, and the same being in due form of law, it is ordered and adjudged that plaintiff, Miss Louise M. Rains, recover of defendant, J. H. McKee, marshal of the United States for the district of Louisiana, and of B. W. Huntington and David R. Godwin, his sureties, the sum of one thousand dollars with costs of suit.

Judgment rendered 31st May, 1867.
" signed 5th June, 1867.
(Signed) CHAS. LEAUMONT, *Judge.*

Fifth District Court of New Orleans.

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.*

MISS L. M RAINS
vs.
JOHN H. MCKEE *et als.*

45

Agreement.

It is hereby agreed, that in above-entitled causes no transcript of any kind, except the pleadings, the verdict of the jury and judgment thereon, and the entries on the minutes, need be filed in the Circuit Court of the United States, and that the defendants shall produce the original record on the trial in the United States Circuit Court in these cases.

Dated in the city of New Orleans, La., this 19th day of July, A.D. 1867.

(Signed) ELMORE & KING,
Att'ys for Pl'ffs.
(Signed) SULLIVAN, BILLINGS & HUGHES.
Atty's for Defendants.

Transcript to include the petitions, amended petitions, answers, amended answers, the verdict, the judgment, the petition for a removal, the order granting the removal, and copy of stipulation, dispensing with the rest of the record.

46

Also transcript of papers mentioned in the above agreement.

Subpœna duces tecum.

Extract from the minutes, Wednesday, January 23d, 1867:
Present: Honorable Charles Leaumont, judge.

MRS. M. A. C. RAINS
vs.
JOHN H. MCKEE *et als.*
No. 16857.

Upon reading and filing the affidavit of John P. Cady, defendant herein, and upon motion of Sullivan, Billings & Hughes, of counsel—

It is ordered, that plaintiff or her attorneys produce on trial of

this cause a certain book called a "journal," the property of said John P. Cady, and also produce an account made and agreed upon in 1865 or '66, between said Cady and said M. A. C. Rains.

Order of court.

Extract from the minutes, Thursday, January 24, 1867:
47 Present: the Honorable Charles Leaumont, judge.

LOUISE M. RAINS
vs. } No. 16415.
JOHN P. CADY.

The jury in this case appeared in court and took in their seats, and the trial of the case was proceeded with.

After hearing testimony and counsel, the hour of adjournment having arrived—

Ordered, that the further hearing of the case be continued until to-morrow, at 11 a. m., and the jurors in court were discharged till that time.

MRS. M. A. C. RAINS
vs. } No. 16857.
J. H. MCKEE *et als.*

MISS LOUISA M. RAINS
vs. } No. 16858.
J. H. MCKEE.

These cases, fixed for trial by jury for this day, were ordered to be continued for trial to the next jury term for want of time.

Subpœna duces tecum.

Extract from the minutes, Tuesday, April 30, 1867:
48 Present: Honorable Charles Leaumont, judge.

MRS. M. A. C. RAINS
vs. } No. 16857.
J. H. MCKEE *et als.*

On motion of Elmore & King, of counsel for plaintiff, upon suggesting to the court that the defendant, J. H. McKee, as United States marshal, has in his possession a list of the articles seized by him on the execution in the case of Buchanan & Co. *vs.* John P. Cady, that said list is material evidence for the plaintiff—

It is therefore ordered by the court, that the said McKee do produce said list or an authenticated copy thereof in court on the trial of this case, on Thursday, the 2d of May next, or whenever the said case may be tried.

MRS. M. A. C. RAINS
vs. } No. 16857.
J. H. MCKEE *et als.*

On motion of Elmore & King, attorneys for plaintiff, and upon suggesting that one of the defendants, J. H. McKee, late U.
49 S. marshal, has in his possession a certain notice adressed to him by Messrs. Elmore & King, as attorneys for plaintiff, on the 20th November, 1866, relative to certain property of hers he had taken into his possession, and evicting her of her dwelling house, a copy of which is annexed to plaintiff's petition, and upon further suggesting that said notice is material evidence in behalf of plaintiff:

It is ordered that the said J. H. McKee do produce in court on Thursday, the 2d of May next, or whenever the case shall be fixed for trial, the said notice above described.

MRS. M. A. C. RAINS
vs. } No. 16857.
J. H. MCKEE *et als.*

On motion of Elmore & King, of counsel for plaintiff, and upon suggesting to the court that Henry Francis, f. m. c., a witness in this case, has in his possession a copy of a notarial act by which he purchased himself from John P. Cady, which document is material evidence for the plaintiff:

It is ordered by the court, that the said Henry Francis do produce said document in court on the trial of this cause on the 2d of
50 May next, or whenever the case may be tried.

Swearing jurors.

Extract from the minutes, Thursday, 2d May, 1867:

MRS. M. A. C. RAINS
vs. } No. 16857.
J. H. MCKEE *et als.*

This case fixed for this day for trial by jury came on.

Elmore & King for plaintiff; Sullivan, Billings & Hughes for defendants.

The following persons were called to the book and sworn, to wit:

A. P. Schneider, M. Finnegan, Chs. Heilderbrandt, E. M. L. Des chapelles, E. Montgomery, H. P. Walter, J. Fortner, Sam'l Hamilton, H. Kroth, L. Labarre, N. Walder, P. Weiss.

The jury being complete the court appointed Edward Montgomery foreman thereof.

MISS L. M. RAINS
vs. } No. 16858.
J. H. MCKEE.

It is agreed by counsel that this case, fixed for trial by jury on tomorrow, be tried together with suit No. 16857, Mrs. M. A.

51 C. Rains *vs.* J. H. McKee *et als.*, by the same jury, and that the testimony in the latter case, so far as relevant to this case, be adopted and applied to this suit, the jury to bring in separate verdicts and judgments.

The trial for the cases was then proceeded with.

Defendants now filed documents in response to the duces tecum of plaintiffs.

It is ordered, that document marked "A," filed on 22d January, 1867, being an order to produce books and papers, be withdrawn from the record, as well as the response thereto.

After hearing pleading, testimony and counsel:

It is ordered, that the further hearing of the cases be continued to-morrow at 12 m., for want of time, and the jurors in attendance were discharged till that time.

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS L. M. RAINS
vs.
J. H. MCKEE. } No. 16858.

Order and continuance.

52 Extract from the minutes, Friday, May 3d, 1867:

The jurors empannelled in this case came in and took their seats, being duly called: Elmore & King for plaintiffs, Sullivan, Billings & Hughes for defendants; Marr & Foute also for defendants.

The trial of the suit was then proceeded with.

After hearing testimony and counsel, ordered that the further hereing thereof be continued to Wednesday, the 10th inst., at 11 a. m., for want of time, and the jurors in court were discharged till that day and hour.

Order and continuance.

Extract from the minutes, Wednesday, May 8th, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS L. M. RAINS
vs.
J. H. MCKEE. } No. 16858.

The jurors in these cases having been called, came in and took their seats: Elmore & King of counsel for plaintiffs, Sullivan,
53 Billings & Hughes and Marr & Foute for defendants.

After hearing testimony and counsel, the further hearing of the

suits were continued till to-morrow at 11 a. m., for want of time, and the jurors in attendance were discharged till that time.

Order and continuance.

Extract from the minutes, Thursday, May 9th, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS L. M. RAINS
vs.
J. H. MCKEE. } No. 16858.

These cases, fixed for trial by jury, came on again this day.
The jurors empannelled were called and took their seats.
Elmore & King for plaintiffs.
Sullivan, Billings & Hughes and Marr & Foute for defendants.
After hearing testimony and counsel, ordered, that the further hearing of the cases be continued by to-morrow, for want of time, and that the jurors in attendance in court be discharged until to-morrow at 11 a. m.

54 *Order and continuance.*

Extract from the minutes, Friday, May 10th, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS L. M. RAINS
vs.
J. H. MCKEE. } No. 16858.

These cases, to be tried by jury, and continued to this day, came on again.
The jurors being duly called, appeared and took their seats.
Elmore & King for plaintiffs.
Sullivan, Billings & Hughes and Marr & Foute for defendants.
After hearing testimony and counsel, ordered, that the further hearing of the cases be continued till Wednesday, 15th inst., at 11 a. m., for want of time.

Order and continuance.

Extract from the minutes, Wednesday, May 15th, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *& als.* } No. 16357.

MISS LOUISE M. RAINS
vs.
J. H. MCKEE. } No. 16858.

55 These cases, continued to this day for trial by jury, came on again.

Elmore & King for plaintiffs.

Sullivan, Billings & Hughes and Marr & Foute for defendants.

The jurors empanelled in the cases were called; 11 appeared and took their seats, Mr. Henry P. Walter, one of the jurors, being sick and absent.

It was now agreed by counsel that the trial should proceed without the presence and attendance of the absent juror.

The trial was then proceeded with, and after hearing testimony and counsel, ordered, that the further hearing of the cases be continued till to-morrow at 11 a. m., for want of time, and the jurors in court were discharged till that time.

Order and continuance.

56 Extract of the minutes, Thursday, May 16th, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS LOUISE M. RAINS
vs.
J. H. MCKEE. } No. 16858.

These cases, continued to this day, for trial by jury, came on again.

Elmore & King for plaintiffs.

Sullivan, Billings & Hughes and Marr & Foute for defendants.

The jurors empanelled in the suits appeared, and being called took their seats.

After hearing testimony and counsel, ordered, that the further hearing be continued till to-morrow at 11 a. m., and the jurors in attendance were discharged till that time.

Order and continuance.

Extract from the minutes, Friday, 17th May, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS LOUISE M. RAINS
vs.
J. H. MCKEE. } No. 16858.

These cases, fixed for trial by jury, came on again this day.
Elmore & King for plaintiffs.
Sullivan, Billings & Hughes, and Marr & Foute for defendants.
57 The jurors empanelled in the suits were called and took their seats.
The trial was then proceeded with.

After hearing testimony and counsel, ordered that the further hearing be continued to Wednesday, 22d May inst.; at 11 a. m., for want of time, and the jurors in attendance in court were discharged till that day and hour.

Order and continuance.

Extract from the minutes, Wednesday, 22d May, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS L. M. RAINS
vs.
J. H. MCKEE. } No. 16858.

These cases came on again this day for trial by jury.
Elmore & Ring for plaintiffs, Sullivan, Billings & Hughes, and Marr & Foute for defendants.
The jurors empanelled being called, Herman Knot failed to answer, he being absent on account of a death in his family.
Counsel now agreed to excuse Mr. Knot, and to proceed to trial without his attendance.
58 The trial was then proceeded with, and after hearing testimony and counsel, ordered that the further hearing of the cases be continued till to-morrow at 11 a. m. for want of time, and the jurors in attendance were discharged till that time.

Order and continuance.

Extract from the minutes, Friday, 24th May, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS L. M. RAINS
vs.
J. H. MCKEE. } No. 16858.

These cases fixed for this day for trial by jury, came on again.

Elmore & King for plaintiffs, Sullivan, Billings, & Hughes, and Marr & Foute for defendants.

The jury empanelled to try the same, being called, took their seats.

The trial was then proceeded with. After hearing testimony and counsel—

Ordered, that the further hearing be continued to Wednesday, 29th May, instant, at 11 a. m., for want of time, and the jury was
59 discharged till that day and hour.

Order and continuance.

Extract from the minutes, Wednesday. 29th May, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS LOUISA M. RAINS
vs.
J. H. MCKEE. } No. 16858.

These cases came on again this day for trial by jury.

Elmore & King for plaintiffs, Sullivan, Billings & Hughes, and Marr and Foute for defendants.

The jurors empanelled being called, appeared and took their seats.

The trial was then proceeded with, and after hearing evidence and counsel, ordered that the cases be continued till to-morrow at 11 a. m., for further argument, for want of time, and the jury was discharged till that hour.

60 *Order and continuance.*

Extract from the minutes, Thursday, 30th May, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16857.

MISS L. M. RAINS
vs.
J. H. MCKEE. } No. 16858.

These cases fixed for this day were ordered to be continued till to-morrow, at 11 o'clock a. m., the minute clerk of this court being absent on account of sickness.

Rule, &c.

Extract from the minutes, Thursday, 13th June, 1867:

MISS L. M. RAINS
vs.
J. H. MCKEE. } No. 16858.

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *& als.* } No. 16857.

On filing the petitions and affidavits of the defendants herein, it is ordered that the plaintiffs shows cause before this court on Tuesday, the 25th June, A. D. 1867, at 11 o'clock a. m., why the prayer of said petitioners should not be granted, and why said suits
61 should not be removed to the Circuit Court of the United States for the fifth judicial circuit, holding its sessions in the district of Louisiana.

61 *Order, rule submitted.*

Extract from the minutes, Tuesday, 25th June, 1867:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE. } No. 16857.

MISS LOUISE M. RAINS
vs
J. H. MCKEE. } No. 16858.

The rule taken in these cases by defendants on the plaintiffs to show cause why these suits should not be removed to the Circuit Court of the United States for the fifth judicial Circuit Court holding its sessions in the district of Louisiana, fixed for this day, came on; Sullivan, Billings and Hughes for plaintiffs in rule; Elmore and King for defendants in rule.

After hearing pleadings and counsel, the rule being submitted, the court took the same under advisement.

62 *Order, cases removed.*

Extracts from the minutes, Friday, 28th June, 1857:

MRS. M. A. C. RAINS
vs.
J. H. MCKEE *et als.* } No. 16854.

MISS LOUISE M. RAINS
vs.
J. H. MCKEE. } No. 16858.

In the matter of the rule taken by the defendants on the plaintiffs to show cause why these cases should not be removed to the Circuit

Court of the United States for the fifth judicial circuit, holding sessions in the district of Louisiana, the court, after deliberation, considering the law to be in favor of the plaintiff's in rule:

It is ordered, that said rule be made absolute, and the said suits be removed to the said Circuit Court of the United States.

Certificate.

I, Francis A. Woolfley, clerk, or A. D. Bernoudy, deputy clerk of the fifth District Court, hereby certify that the above and foregoing seventy-four pages contain a true and correct copy of the petitions, supplemental petitions, answers, extracts from the minutes, verdicts of the jury and of the judgments in the cases of Mrs. M. A.
63 C. Rains *vs.* J. H. McKee and John P. Cady, No. 16857, and Miss Louise M. Rains *vs.* J. H. McKee, No. 16858, instituted and now in the records thereof, respectively under the numbers aforesaid, as per agreement of counsel.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court at the city of New Orleans, this thirtieth day of October, in the year of our Lord one thousand eight hundred sixty-seven, and in the ninety-second year of the independence of the United States of America.

[SEAL.] (Signed) WOOLFLEY, *Clerk.*

Proceedings in the U. S. Circuit Court.

Agreement and submission of cause.—Filed Dec. 2d, 1867.—U. S. C. C.

MRS. M. A. C. RAINS *vs.* J. H. MCKEE *et als.* } No. 5333.

In this case it is agreed that a motion similar to the one filed in the case of Miss Louise M. Rains, and upon the same grounds, shall be considered as filed for remanding the cause to the State Court, and that the same shall be considered as submitted to the court upon the argument already made.

64 (Signed) ELMORE & KING,
Att'ys for Pl'ff.

(Signed) SULLIVAN, BILLINGS & HUGHES,
Att'ys for Def'ts.

United States Circuit Court for the fifth circuit, holding sessions in New Orleans for the district of Louisiana.

Rule and grounds to remand the cause filed November 23, 1867, in the case of Miss Louise M. Rains *vs.* J. H. McKee, No. 5334 of the docket of the U. S. Circuit Court, and entered in the minutes of same date:

MISS LOUISE M. RAINS *vs.* J. H. MCKEE. } No. 5334.

In the suit of the above title, on motion of Elmore & King, attorneys for plaintiff, it is ordered by the court that the defendant show

cause, if any he has, on Saturday next, the 30th day of November, 1867, at 11 a. m., why the said case should not be remanded to the fifth District Court of New Orleans, with liberty to the plaintiff to prosecute her judgment obtained in said court in the cause, upon the following grounds, to wit:

65 1st. The said cause was improperly transferred from the said fifth District Court of New Orleans to this hon. court, as appears from the record filed in this hon. court, no sufficient cause for removal being alleged or shown.

2d. This hon. court has no jurisdiction to try the said cause. It has not jurisdiction on account of the citizenship of the parties, all being citizens of the State of Louisiana. It has not jurisdiction from the nature of the suit, or the subject-matter presented for trial in the suit.

3d. The said case could not be legally removed from the said fifth District Court of New Orleans under the act of Congress of the 9th of April, 1866, entitled "An act to protect all persons in the United States in their civil rights and to furnish the means of vindication," nor under any other act of Congress, as is manifest from the facts disclosed by the record.

4th. The said act of Congress of April the 9th, 1866, is unconstitutional and void.

66 Circuit Court of the United States, fifth circuit and district of Louisiana, November term, 1867.

Judgment from judgment docket.

NEW ORLEANS, *Thursday, 9th January*, 1868.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, district judge.

MRS. M. A. C. RAINS
vs.
J. H. MCKEE AND J. P. CADY. } No. 5333.

Considering the decree made in suit 5334, Louisa M. Rains vs. J. H. McKee, and the consent of parties on file:

Ordered, that this cause be transferred to the fifth District Court of New Orleans, for further proceedings, according to law.

Judgment rendered January 9th, 1868.

Judgment signed January 14th, 1868.

(Signed) E. H. DURELL, *Judge.*

Circuit Court of the United States, fifth circuit and district of Louisiania, November term, 1867.

Decree in case No. 5334, *from judgment docket.*

NEW ORLEANS, *Thursday, January 9th,* 1868.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, district judge.

67 LOUISE M. RAINS *vs.* J. H. MCKEE. } No. 5334.

For reasons orally assigned, it is ordered that the rule taken by the plaintiff on the 23d of November, 1867, be sustained, and that this cause be remanded to the fifth District Court of New Orleans, for further proceedings according to law.

Judgment rendered January 9th, 1868.

Judgment signed January 14th, 1868.

(Signed) E. H. DURELL, *Judge.*

United States Circuit Court for the fifth judicial circuit and district of Louisiana.

Petition for writ of error.—Filed Januarg 22d, 1868.

MRS. M. A. C. RAINS *vs.* JOHN H. MCKEE, DAVID R. Godwin, Benjamin W. Huntington and John P. Cady. } No. 5333.

To the honorable the judges of the Circuit Court of the United States for the fifth judicial circuit and district of Louisiana:

68 The petition of John H. McKee, David R. Godwin, Benjamin W. Huntington and John P. Cady, defendants, herein respectively shows, that they are aggrieved by the final judgment rendered against them in the suit of M. A. C. Rains, numbered 5333 of the docket of this court, and are informed that there is error therein to their prejudice, and they are desirous that a writ of error be allowed therefrom to the Supreme Court of the United States, wherefore they pray that a writ of error be allowed therein returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersedas upon their giving bond in such amount as the court may direct and order.

(Signed) SULLIVAN, BILLINGS & HUGHES.

Atty's for Defendants and Petitioners.

Circuit Court of the United States, fifth circuit and district of Louisiana, November term, 1867.

Order allowing writ of error.—Extract from the minutes.

NEW ORLEANS, *Wednesday, January 22d*, 1868.

Court met pursuant to adjournment. Present: Hon. E. H. Durell, dis't judge.

MRS. M. A. C. RAINS
vs.
69 J. H. MCKEE *et als.* } No. 5333.

On motion of Sullivan, Billings & Hughes, and upon presenting to the court the petition for a writ of error on behalf of the def'ts, and on filing the bond with Joseph Oglesby as security in the sum of thirteen thousand dollars ($13,000,) it is ordered, the said writ having been allowed and the said bond being accepted, that the said writ operate as a supersedeas upon the said defendants lodging with the clerk of this court for the adverse party copy of said writ, as the law requires.

United States Circuit Court.

Bond for writ of error.—Filed January 22d, 1868.

M. A. C. RAINS
vs.
JOHN H. MCKEE *et als.* } No. 5333.

Know all men by these presents, that we, John H. McKee, David R. Godwin, Benjamin W. Huntington and John P. Cady, as principals, and Joseph H. Oglesby, of the city of New Orleans, as surety, are held and firmly bound, jointly and severally, unto M. A. C. Rains in the sum of thirteen thousand dollars ($13,000) lawful money of
70 the United States of America, to be paid to the said M. A. C. Rains, her heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the seventeenth day of January, in the year of our Lord eighteen hundred and sixty-eight.

Whereas the said M. A. C. Rains recovered judgment against the principals above named, in the fifth District Court of New Orleans, and the cause in which such judgment was recovered was removed to the Circuit Court of the United States holding its sessions in New Orleans, and whereas judgment was rendered in said Circuit Court on the day of January, A. D. 1868, remanding said cause to the said District Court, and whereas the principals above named have this day presented a petition to the honorable the Circuit Court of

the United States for the fifth circuit holding sessions in and for the district of Louisiana, praying for a writ of error to review the
71 said judgment of the said Circuit Court before the Supreme Court of the United States:

Now the condition of the above obligation is, that if we, the above-bounden John H. McKee, David R. Godwin, Benjamin W. Huntington and John P. Cady, shall prosecute their writ to effect and answer all damages and costs if they fail to make good their plea, and shall well and truly pay to the said M. A. C. Rains, the defendant in said writ of error, all such damages as she may recover against us in case it should be decided that the said writ of error was wrongfully obtained, then the above obligation to be void, else to remain in full force and virtue.

(Signed) [L. S.] JOHN H. McKEE.
" [L. S.] DAVID R. GODWIN.
" [L. S.] BENJAMIN W. HUNTINGTON.
" [L. S.] J. P. CADY,
By SULLIVAN, BILLINGS & HUGHES, *Att'ys.*
" [L. S.] J. H. OGLESBY.

Signed, sealed and delivered in the presence of—
(Signed) W. L. S. TOWDSHARD.
" EDWARD C. BILLINGS.

72 Circuit Court of the United States, fifth circuit and district of Louisiana.

UNITED STATES OF AMERICA:

CLERK'S OFFICE.

I, Dominick Urban, clerk of the Circuit Court of the United States for fifth circuit and district of Louisiana, do hereby certify that the foregoing 71 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Mrs. M. A. C. Rains vs. J. H. McKee et als., No. 5333 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 17th day of August, A. D. 1868.

[SEAL.] D. URBAN, *Clerk.*

[5-c. stamp.]

I, E. H. Durell, United States judge for the district of Louisiana, do hereby certify that Dominick Urban, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand and seal, at the city of New Orleans, in said district, this 17th day of August, A. D. 1868.

E. H. DURELL, *Judge.*

[5-c. stamp.]

73 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the Circuit Court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and procedings, as also in the rendition of the judgment of a plea and a decree denying the jurisdiction of said oourt, which is in the said Circuit Court before you, or one of you, between M. A. C. Rains, plaintiff, and John H. McKee, David R. Godwin, Benjamin W. Huntington and John P. Cady, defendants, a manifest error hath happened to the great damage of the said John H. McKee, David R. Godwin, Benjamin W. Huntington, and John P. Cady, defendants as aforesaid, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 22nd of January, in the year of our Lord one thousand eight hundred and eight.

[SEAL.] D. URBAN,
Clerk of the United States District Court
for District of Louisiana.

Endorsed: United States Circuit Court. No. 5333. John H. McKee et als. vs. M. A. C. Rains. Writ of error. Filed Jan'y 22, 1868. F. B. Vinot, d'y cl'k.

74 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to Mrs. M. A. C. Rains, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the fifth circuit and district of Louisiana, wherein John H. McKee, David R. Godwin, Benjamin W. Huntington, and John P. Cady are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiffs, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 23d day of January, in the year of our Lord one thousand eight hundred and sixty-eight.

E. H. DURELL, *Judge.*

Endorsed: United States Circiut Court. No. 5333. Mrs. M. A. C. Rains vs. John H. McKee et als. Citation in error.

Marshal's return.

Received Jan. 23, 1868, by the U. S. marshal, and on the 25 day of January, 1868, served a copy of the within citation in error on Mrs. M. A. C. Rains, named herein, personally at her domicil, No. 165 Richard street, in this city.

S. W. REED,
D'y U. S. Marshal.

New Orleans, Jan'y 27, 1868.

Supreme Court of the United States.

JOHN H. McKEE ET AL., PLAINTIFFS IN ERROR,
vs.
M. A. C. RAINS, DEFENDANT IN ERROR.

In error to the Circuit Court of the United States for the District of Louisiana.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR.

FACTS.

J. H. McKee, one of the plaintiffs in error, was marshal of the United States for the district of Louisiana, and B. W. Huntington and David S. Godwin, the other plaintiffs in error, were sureties on his official bond.

See Record, p. 6, at top, and copy of official bond, Rec., pp. 6 and 7.

The marshal, McKee, had a *fi. fa.* from the United States Circuit Court, by virtue of which he seized certain property claimed by the defendant in error, M. A. C. Rains, who brought suit for trespass against the marshal and his sureties, in which she claimed fifty thousand dollars damages, in the fifth district court of the city of New Orleans, a State court, on the fourth of November, 1867.

See her petition in said court, Rec., pp. 1 to 3, and her supplemental petition, Rec., pp. 5 to 7.

To these petitions, the plaintiff in error made answers, setting up defences to the action.

See Rec., pp. 4, 5, and 7 to 9, and 10, 11.

On the 31st May, 1867, the case was tried in the State

court, and the jury gave a verdict against the plaintiffs in error for $7,500.

See Rec., p. 11.

On this verdict the State court gave judgment.

See Rec., p. 11.

On the 13th June, 1867, after this, the plaintiffs in error presented a petition to the State court, praying, for reasons therein alleged, that said suit might be removed to the next Circuit Court of the United States to be holden in the district of Louisiana.

See Rec., pp. 9, 10.

Similar proceedings were carried on in the same State court, about the same time, by L. M. Rains, claiming a thousand dollars for a piano alleged to be her property, and alleged to have been unlawfully seized by the plaintiff in error, McKee, on the same *fi. fa.*, and a judgment was rendered in her favor for the amount claimed.

See Rec., pp. 11 to 15, and 18, 19.

In this suit a similar petition was also presented to the State court for removal of the cause to the United States Circuit Court.

See Rec., pp. 15, 16.

On these applications the State court directed a rule on the defendants in error to show cause why the suits should not be removed to the United States Circuit Court.

See Rec., p. 16.

They showed cause in writing.

Rec., p. 17.

The question of removal was argued by both sides before the State court, on 25th June, 1867.

See Rec., p. 27.

On the 28th June, 1867, the State court ordered the removal of the suits to the United States Circuit Court.

See Rec., pp. 27 and 28.

The transcripts of the two suits thus ordered to be transferred were filed in the United States Circuit Court on 4th November, 1867.

See Rec., p. 1.

On the 23d November, 1867, the defendant in error obtained, in the United States Circuit Court, a rule on the plaintiffs in error to show cause why these causes should not be remanded to the State court, on grounds then assigned.

See Rec., pp. 28 and 29.

On January 9, 1868, the court below made the rule absolute, and ordered the causes to be "remanded to the fifth district court of New Orleans, for further proceedings, according to law."

See Rec., pp. 29 and 30.

It is submitted that the court below erred, as it was vested with complete jurisdiction over the causes which had been regularly removed from the State court.

POINTS.

First. The 5th section of the act of 3d March, 1863, (12 Statutes at Large, pp. 756 and 757,) provides "that if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any officer, *civil or military*, or against any other person, for any arrest or imprisonment made, *or other trespass* or wrongs done or committed at any time during the present rebellion, by virtue of any authority derived from any act of Congress, the defendant may, on entering his appearance,

&c., and giving bond, remove the case to the next circuit court."

A subsequent portion of the same section of the act provides for the removal of such causes also after final judgment in the State court.

Second. The third section of the act of May 11, 1866, (see Acts, p. 46,) modifies the act of 1863 above quoted. It dispenses the defendant from the necessity of giving bond in the State court, and provides that on the filing in the State court of a petition for removal, verified by oath, all proceedings in the State court must cease.

Third. The plaintiffs in error complied fully with the requirements of these two acts, and their right to go to the Circuit Court was complete, as the act for which they were prosecuted in the State court was done during the rebellion, to wit, about the 12th November, 1866.

See Act of Congress of March 2, 1867, Acts, p. 428.
Act of Congress of July 19, 1867, Acts, p. 14.

These declarations by the political department of the Government, that Louisiana—and other States—was in rebellion in 1867, are conclusive as to the applicability of the act of 3d March, 1863, and of 11th May, 1863, to the present case.

"Under the fourth article of the Constitution of the United States, it rests with Congress to decide what government is the established one in a State; for as the United States guarantee to such State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not." "And its decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal."

Luther *vs.* Borden, 7 Howard, p. 42.

Hence the declaration by Congress that a State (*i. e.*, the inhabitants of a State) is in rebellion, and that no legal State government exists there, is the announcement of a political truth which rests in the exclusive cognizance of the Legislative branch, and cannot be drawn in question by any other.

Fourth. The Congress having power to declare war (U. S. Const., Art. I, sec. 8, § 11) and to carry it on, to raise and support armies, (§ 12,) to provide for calling forth the military to suppress insurrections and repel invasions, (§ 15,) and to make all laws necessary and proper to carry these powers into effect, (§ 18,) must necessarily have the exclusive right to judge when and in what manner these powers are to be exercised, and when their exercise is to cease; all of which are political questions, and in nowise of a judiciary character.

Congress, by its legislation, having declared that, at the date of the act complained of in the petition in the State court in this case, the rebellion had not ceased in Louisiana, that declaration is conclusive upon the judiciary.

Fifth. Louisiana having, by act of Congress, and in pursuance thereof, been declared in insurrection, as a State, it so remained until Congress retracted that declaration, which must be considered only to have taken place when Senators and Representatives from Louisiana were admitted into the councils of the Union, (7 Howard, p. 42,) and this event did not happen until the session of Congress which commenced in December, 1868.

Sixth. The right of removal guaranteed by the acts of 3d March, 1863, and 11th May, 1866, is also recognized by the provisions of "An act to protect all persons in the United States," &c., &c., approved 9th April, 1866.

See Acts of that year, p. 27.

The plaintiffs in error made oath that by reason of the prejudice of the jury and jurors against the official character of J. H. McKee, United States marshal, they had not the full and equal benefit of the laws and proceedings, and, therefore, that they were denied and could not enforce their legal rights.

See Rec., pp. 15, 16.

This was sufficient to give the United States Circuit Court in Louisiana jurisdiction of the case, and it was error in the court below to dispose of the questions involved before a trial on the merits.

Denistoun *vs.* Draper, 5 Blatchford, p. 336.
Murray *vs.* Patrie, " p. 343.
The Mayor *vs.* Cooper, 6 Wallace, p. 247.

Respectfully submitted.

THOMAS J. DURANT,
for Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1869—No. 130.

JOHN H. McKEE ET AL. vs. MARY A. C. RAINS.

Mrs. Rains commenced her action of trespass in the Fifth District Court of New Orleans, against the appellants for forcibly entering her dwelling-house and carrying away a large amount of furniture. (P 1.)

McKee filed an answer on 8th December, 1866, averring that the property had been taken by virtue of an execution directed to him as marshal from the Circuit Court of the United States, in a suit of Buchanan & Co. *vs.* John P. Cady, and that the property was subject to seizure and sale under that execution. (P. 5.)

Cady and the other defendants filed a general denial.

On the 11th December, 1866, a supplemental petition was filed, averring that McKee had abused his office as marshal for the purpose of perpetrating "the outrages and trespases complained of," and the sureties on his official bond are made parties. (Pp. 5, 6.)

In answer to this McKee makes the same averments as ware made to the original petition. (Pp. 8, 9.)

A verdict and judgment for the sum of $7,500 was rendered against the defendants *in solido* on 31st May, 1867. (P. 11.)

The defendants then filed a petition for the removal of the case to the Circuit Court of the United States, upon the ground that "they are informed and believe" they did not have justice done them by reason of the prejudice of the jury against his official character as marshal; that this grievance cannot be corrected or prevented either by the judge of the District Court or by the Supreme Court of the State on a review of the case; that they have been denied, and cannot enforce in said tribunal the "rights guaranteed to them by the act of Congress 9th April, 1866." (P. 10.)

The prayer of the petitioner was granted, and the case was certified to the Circuit Court.

On the 9th January, 1868, the Circuit Court, by its judgment, remanded this cause to the Fifth District Court for further proceedings.

To reverse this judgement the present writ of error is brought.

It will be borne in mind that the sole ground for removal is claimed by the petitioner under the provisions of the act of 9th April, 1866. (14 Stats., 27.)

The worthlessness of this ground is shown by the slightest attention to the provisions of the act. It is unworthy a serious discussion, and the ground has been virtually abandoned by the learned counsel who files a brief in this Court. He does not even refer to it.

The 5th section of the act of 1863, 3 March, 12 Stat., 756, *is now relied on.* So far as this attempts to confer a power upon the circuit court to retry the facts found by a verdict of a jury in the State court by merely removing the cause from the one to the other jurisdiction, I should feel great confidence in maintaining, (if the exigency of this case required it,) that it is in direct conflict with that provision of the Constitution which declares that "no fact tried by a jury shall otherwise be re-examined in any court of the United States than according to the rules of the common law."

We may waive the consideration of this grave question by showing that this act is wholly inapplicable to the present case.

The acts intended to be covered by this 5th section were arrests, imprisonments, or trespasses done "*during the present Rebellion.*" But this limitation of time is subject to another. They must also have been committed "under or by color of *authority derived from the President of the United States, or from an act of Congress.*"

When both these facts concurred, then there was secured to the officer sued in a State court the right to have the cause removed, provided he applied for this *at the time of entering his appearance.*

A further provision is made, that in such a suit, *after final judgment,* either party might remove the cause by "*appeal*" to the circuit court, if done during the term at which judgment was rendered.

It is claimed in the opposing brief that the act complained of, to wit, the trespass, committed on 12th November, 1866, was done *during the Rebellion.*

But supposing we should admit this, there are still other requirements. It must be shown that it was done under the authority of the President, or an act of Congress. Even if all this could be exhibited, the case is still fatally defective, in this, that by the express provisions of the act, *after final judgment,* the circuit court can only take jurisdiction by "*appeal.*"

This avoids the discussion of the question whether the Rebellion had not closed when the act complained of was committed. This subject I have fully considered in the brief prepared by me in *ex parte* E. M. Yerger, but not heretofore used, and I refer the court, if they should deem it necessary to consider it, to the discussion to be found commencing at p. 18 of that brief.

The only other act relied on by opposing counsel is that of 11th May, 1866, 14 Stat., 46. This, by its 3d section, so

far modifies the act of 3d March, 1863, as to extend the right of removal down to the time of empannelling the jury to try the cause. Then immediately follows this language: "But nothing herein contained shall be held to abridge the right of such removal after final judgment in the State court," under the 5th section of the act of 1863.

It is not necessary to do more than merely to announce the position that the act of 1866 confers no new power nor institutes no new provisions where final judgment has been rendered. It is merely declaratory of the intention not to disturb the right as secured by the act of 1863, and, as we have already seen, this was the right of "*appeal*," which either party might exercise.

To suppose that this word "appeal" is not to be construed in its technical legal sense, but is intended only as the synonym of *removal*, is to charge the Legislature with the absurdity of first specially providing that a removal shall not be granted after the "jury is empanelled," and in the same section permitting it to be done even after "final judgment."

The effort on part of executive officers to shield themselves from trespasses by invoking the authority of the United States, and thus transferring their cases to Federal jurisdiction, is not a novel one in this court. It has been denounced whenever made.

Day v. Gallup,	2	Wall., 97.
Buck v. Colback,	3	" 334.
Millingar v. Hartupee,	6	" 259.

This brief has been prepared, not because the case required one, but in compliance with a rule of the Court, and to afford facility for referring to the several statutes. The case is one of great hardship to the complainant, a widowed woman, whose occupation was destroyed by the trespass complained of.

It will be seen that the petition is founded on the allegation of prejudice in the jurors, and that this "grievance is of such

a nature, that it cannot be corrected or prevented, either by the judge presiding or by the Supreme Court of Louisiana on a review of the case."

Whatever may be alleged as to the *jury*, there is no pretence that any prejudice exists against the authority of the United States or its officers on the part of the *judges* It is well known that these have been appointed on the very ground that they do not sympathise with the mass of the people.

The acquiescence in the judge, *aquo* in this extraordinary application for removal, is strong evidence to show on which side the bias was if any existed.

It is not true that the defendants could not be protected by an appeal to the Supreme Court of the State. If the judgment was for too large an amount, it could then be reduced. The whole case is before them on appeal, and such justice as the evidence warranted could be effectually administered.

The falsity of these pretences are stated for the purpose of showing that the object of the removal to the circuit court, and its removal from the circuit to this Court, is merely to baffle and delay the plaintiff below in the collection of her judgment. *It justifies the application now made for an affirmance of the judgment, with damages at the rate of* 10 *per cent. per annum, under the* 23*d rule.*

Lathrop *v.* Judson, 19 Howard, 68.

Prentice *v.* Pickengill, 6 Wall., 511.

P. PHILLIPS,
Solicitor for Appellee.

WASHINGTON,
March 10, 1870.

9.

Supreme Court of the United States.

EX PARTE

EDWARD M. YERGER.

Petition for Habeas Corpus.

P. PHILLIPS,

OF COUNSEL FOR PETITIONER.

H. Polkinhorn & Co., printers, D street, bet. 6th and 7th sts.

Supreme Court of the United States.

EX PARTE EDWARD M. YERGER.

The petitioner, on the 22d day of July, 1869, filed his petition in the Circuit Court of the United States for the Southern District of Mississippi, setting forth that he was a citizen of the said State, in no wise connected with the military service of the United States; that he was then held in custody for trial before a military commission for an offence alleged to have been committed "against the peace and dignity of the State," and praying for the writ of habeas corpus that the legality of his commitment may be inquired into.

The writ was issued, and on the 22d July he was produced in open Court by Brevet Major General R. S. Granger, whereupon it was ordered by the court, that "the said Edward M. Yerger be placed in the custody of the Marshal of the Southern District of Mississippi, to be by him held and detained in custody until the further order and judgment of the Court."

Afterwards, the "cause coming on to be heard," the following entry was made: "The Court therefore accordingly adjudges, that the imprisonment of the prisoner for the causes in the return to the writ of habeas corpus, in the case set forth, are sufficient cause and warrant in law for his detention by said Granger. It is therefore ordered, that the writ be dismissed, and the prisoner remanded to custody of said Brevet Major General R. S. Granger, to be

by him held and detained in custody for the purposes, and to answer to the charge as set forth in the return of said Granger."

On these facts the petitioner founds his application to this Court for the writ of habeas corpus, aided by a certiorari. And first, as to the jurisdiction.

JURISDICTION.

The 14th section of the act of 1789 provides that the several Courts of the United States "shall have power to issue the writs of scire facias, habeas corpus, and all other writs not specially provided for by the statute, which may be necessary to the exercise of their respective jurisdictions, agreeably to the principles and usages of law; and that either of the Justices of the Supreme Court, as well as the Judges of the District Court, shall have power to grant the writ of habeas corpus for the purpose of an inquiry into the cause of the commitment: *Provided*, That writs of habeas corpus shall in no cases extend to prisoners in gaol unless they are in custody under or by color of the authority of the United States, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify."

This statute at an early day was discussed before this Court, and it was then held—

1st. That the restrictive words "necessary to the exercise of their respective jurisdictions" did not apply to the writ of habeas corpus.

2d. That the proviso extended to the whole section.

3d. That where the commitment was by an inferior Court of the United States, this Court, in the exercise of its appellate jurisdiction, could issue the writ to inquire into the cause of the commitment. (Ex parte Bolman, 4 Cr., 101.)

In Ex parte Crane, which was an application for a mandamus, it was insisted by Judge Baldwin—"that there

were but two cases in which the appellate jurisdiction could be exercised, to wit, appeals and writs of error; and that the writ of mandamus contains no order to remove a cause, or any proceedings therein to the Court issuing it, nor has it this effect."

But the decision of the Court was, that a "mandamus to an inferior Court of the United States is in the nature of appellate jurisdiction. That in England it is awarded by the Chancellor, but in the United States it is expressly conferred on this Court, which exercises both common law and chancery powers; is invested with appellate powers; and exercises extensive control over all the Courts of the United States."

It is therefore apparent that the exercise of the appellate power is not limited to any particular form; where the object is to revise a judicial proceeding the mode is wholly immaterial, and a writ of habeas corpus, or mandamus, a writ of error or an appeal may be used as the Legislature may prescribe. (2 Story Comm. Con., 570.)

When the habeas corpus is used it may not be, strictly speaking, a power of revision, which includes properly the power to affirm or reverse the judgment, and so establish or destroy it, but a power to arrest the *execution* of a void judgment; it acts directly on the effect of the judgment, and collaterally on the judgment itself.

In Bolman's case the Chief Justice says: "The question whether the individual shall be imprisoned, is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore the questions are separated, and may be tried in different Courts. The decision that the individual shall be imprisoned must always precede the application for the writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature."—4 Cr., 101.

So in Ex parte Metzger, Justice McLean says: "It may be admitted there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of habeas corpus. In this form nothing more can be examined into than the legality of the commitment. In criminal cases this Court can have no revisory power over the decisions of the Circuit Court; and yet, as appears from the cases cited, 'the cause of commitment in that Court' may be examined in this on a writ of habeas corpus, and this is done by the exercise of appellate power."—5 How., 191.

It may be said that the "cause of the commitment" is not to be found in the action of the Circuit Court now under consideration; that this Court only remanded him to the custody in which it found him.

Our answer is, that when Yerger filed his petition claiming that his imprisonment was in violation of the Constitution, he then instituted a *suit*, there was then a *case* arising under the Constitution to which the judicial power attaches; and when a judgment is rendered denying the right claimed, the appellate power is properly invoked. (2 Story C. C., 485–6.)

In the celebrated case of Yates *vs.* The People, 4 John., Yates who had been imprisoned for contempt by the Chancellor, applied to the Supreme Court for a habeas corpus. On the return to the writ the Court held the return to be good, and remanded him into custody; whereupon he sued out his writ of error.

A most elaborate discussion was had as to the character and effect of this judgment or order. A majority of the Court held "that the question brought up on a writ of habeas corpus was, Is the prisoner legally imprisoned? If the Court decide in the affirmative, the deprivation of liberty continues. Is not this a final decision of the case, and does it not deprive the party of the remedy he solicits?

But admitting it is not technically a judgment, yet it clearly comes within the definition of Coke. It is an award, in the nature of a judgment. And as a habeas corpus is in the nature of a writ of error, so is the determination upon it in the nature of a judgment."

The same question has been considered by this Court. Holmes was arrested by Gov. Jennison, of Vermont, who ordered him to be sent to Canada to answer to an indictment. He applied for habeas corpus to the Supreme Court of the State, and, on coming in of the return thereto, was remanded to custody. A writ of error was sued out to this Court under the 25th section of the Judiciary Act, and it was held by the Chief Justice, whose opinion was concurred in by Story, McLean, and Wayne, Justices, that this was a "final judgment" in a "suit" within the meaning of this section.

Catron, Justice, delivered a separate opinion, in which he concurred in this view; and on this point of the case Baldwin, Justice, alone dissented.

In a very recent case the question was presented under the 22d section, when the Court, speaking through Nelson, Justice, declared that no doubt was entertained that the judgment was a final judgment, and that the only objection to the jurisdiction was the want of the property value required by that section.—Pratt *vs.* Fitzhugh, 1 Black, 272.

The same principle was applied in the case of Weston *vs.* The City of Charleston, 2 Pet., 449. Prohibition was applied for to prevent the collection of an unconstitutional tax. This was refused, and the refusal was held to be a *final judgment* in a *suit.*

We turn back to the case In re Kaine, decided in 14 How., 103. Kaine, a fugitive from Great Britain, was arrested by the Commissioner of the United States. He applied to the Circuit Court for a habeas corpus, and, on return thereto, was remanded to custody. Thereupon he applied to this Court for a habeas corpus and certiorari.

The question of jurisdiction—though, as it would seem, was not made at the bar—was raised very distinctly by Judge Curtis.

The case is fully considered as to the facts, and the opinion of the Court, delivered by Judge Catron, and concurred in by McLean, Grier, and Wayne, Justices, thus concludes: "We refuse the motion on its *merits*. We are not disposed, *under the circumstances*, to exercise the *jurisdiction of the Court*."—(P. 117.)

Judge Curtis strenuously insisted that the Court had no jurisdiction, on the ground that the action of the Circuit Court was not "the cause of the commitment"—that it created no new cause, but simply declared the existing cause to be sufficient.

This argument is combatted by Judge Nelson, who, after reviewing all the cases theretofore decided, says: "The whole case was in that Court, and pending the examination the prisoner is detained, not on the original warrant, but under the authority of the writ of habeas corpus. The efficacy of the original commitment is suspended by the writ while the proceedings under it are pending, and the safe-keeping of the prisoner is entirely under the direction of the Court issuing it, (p. 134.) This opinion is very emphatically approved by the Chief Justice and Justice Daniel.

Again: in Ex parte Wells, 18 How., 307—decided as late as 1855—Wells, who had been convicted of murder, received a pardon from the President, commuting his sentence to imprisonment for life. He petitioned the Circuit Court of this District for a habeas corpus, claiming that the pardon was absolute and the condition void. On hearing of the return, the Circuit Court dismissed the writ and remanded him to custody. On his application to this Court for a habeas corpus, all the Judges, except Curtis and Campbell, Justices, assumed jurisdiction and denied the writ on the merits.

In his dissenting opinion, Judge Curtis says: "In Kaine's case I examined with care the jurisdiction of this Court to issue writs of habeas corpus, to inquire into the cause of commitment. I then came to the conclusion that the mere fact that the Circuit Court had examined the cause of commitment and *refused to discharge the prisoner* did not enable this Court, by a writ of habeas corpus, to re-examine the same cause of commitment. Though subsequent reflection has confirmed the opinion then formed, I should have acquiesced in *the jurisdiction assumed in this case* if a majority of the Court in Kaine's case had decided contrary to my opinion. But the question was then left undecided; and in this case, for *the first time, in my judgment, has jurisdiction been assumed*, on the ground, that as the Circuit Court has had the prisoner before it, and has remanded him, this Court by writ of habeas corpus may examine that decision and see whether it be erroneous or not."—328.

This case, then, even in the opinion of Judge Curtis, finally settled the question involved in the present application.

But the facts now before us authorise us to proceed one step further. It will be seen by the argument of Judge Curtis in Kaine's case, that he mainly rests his denial of the jurisdiction on the ground that the "custody of the prisoner was at no time changed." He admits "that when a prisoner is brought into Court under the habeas corpus, he is in the power and under the control of the Court; *but unless the Court makes some order changing the custody, it remains.* The Court may in some cases admit to bail, and may also take order for the future production of the prisoner without bail; but in all cases, until the Court *make some order changing the custody*, either for the care or security of the prisoner, the original custody continues. *In this case no order was made.*"

It would seem, therefore, that the pivotal question of

jurisdiction, in the opinion of Judge Curtis, is, whether there has been an order of the Circuit Court *changing the custody.* Now by turning to the entry made in this case, it will be found that when the prisoner was produced under the writ, the Court ordered, that "the said Edward M. Yerger be placed in custody of the Marshal of the Southern District of Mississippi, to be by him held and detained in custody until the further order and judgment of the Court."

It was by the judgment of the Court that the custody thus held by the Marshal was transferred to that of the military authorities, and so, in maintaining the jurisdiction of the Court, in the present application, we are fortified with the opinions of all the Judges of this Court since its organization, saving only that of Judge Baldwin.

We scarcely deem it necessary to consider the effect of the act of 5th of February, 1867. This did not in anywise operate a repeal of the provisions of the act of 1789, but was passed for the declared purpose of conferring "*additional authority.*" The act of 1868, which took away the right to an "*appeal*" given by it did not affect the appellate power of this Court by means of the habeas corpus under the act of 1789. It is sufficient on this point to refer to the decision made at the last term:

"Counsel seem to suppose that if effect be given to the repealing act in question, that the whole appellate power of the Court in cases of *habeas corpus* is defeated. But this is an error; the act of 1868 does not except from that jurisdiction any cases but *appeals* from Circuit Courts under the *act of* 1867. It does *not affect the jurisdiction which has been previously excercised.*" Ex parte McArdle, 7 Wall., 515.

FINALLY.

As to the argument *ab in convenienti*, we are content to use the language of Nelson, J.:

"It has been argued that great inconvenience would arise if the writ of habeas corpus could issue from this Court into any part of the Union to bring up a prisoner on a petition that he was illegally restrained of his liberty under the authority of the United States, as the proceeding must be attended with delay and expense, by reason of the great extent of our territory. But it must be remembered that in the case of a right of property involved, dependent upon the laws of the Union, and a decision against it, the party against whom a decision had been made in a State Court, however small the amount in controversy, is entitled to a writ of error to this Court. And I am yet to learn that the right of the liberty of the citizen, is not as dear to him, and entitled to be guarded with equal care by the Constitution and laws, as the right of property, notwithstanding the supposed inconvenience. Such has heretofore been, as we have seen the opinion in this Court when dealing with the writ in question, and I will simply add, in the language of Chief Justice Denman, in the case of the Canadian prisioners, "that it seems to me that we would be tampering with this great remedy of the subject if we did not say that we would abide by the practice we find and deal with this as it has been formerly dealt with." (In re Kaine, 14 How., 135.)

ON THE MERITS.

The act 2d March, 1867, recites in its preamble that "no legal State governments, or adequate protection for life or property exists in the Rebel States," and that it "is necessary that peace and good order should be enforced in said States until loyal and republican State governments be legally established."

It then divides these States into military districts, authorizes the appointment of a military commander for each with a military force to sustain his authority.

The 3d section empowers the military commander "when in his judgment it may be necessary for the trial of offenders to organize military commissions or tribunals, and all interference under color of State authority (is declared) null and void."

It is by the authority of this 3d section alone that the trial of the prisoner by a military commission is sought to be justified; and in challenging the validity of this power we are not unmindful of the gravity of the subject, or of the caution with which this Court proceeds when passing upon the validity of acts of a co-ordinate department.

No right of citizenship has ever been held more sacred than that of trial by jury.

Magna Charta declares that "no freeman shall be taken, imprisoned, or outlawed, &c., nor will we pass upon him, &c., unless by the lawful judgment of his peers or by the law of the land."

Whether courts of justice framed the writ of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it became from that era the right of any subject to demand it. (Hallam, Hist. Mid. Ages, 2 vol., 342.)

The rights and liberties thus acquired and secured to British subjects were universally claimed by the American colonists, and constantly asserted in their assemblies. (1 Story Com., § 165.)

So we find that the Convention of the Colonies which assembled in New York in 1765, and the Continental Congress of 1774, both made emphatic proclamation of these principles.

In the adoption of the ordinance of 1787 for the Government of Northwestern Territory, it was declared that the inhabitants thereof "shall always be entitled to the benefits of the writ of habeas corpus and trial by jury."

The same provision was applied to the cession of terri-

tory by Georgia in 1802, and when Congress passed the act enabling the people of Mississippi to form a State government, it was convenanted that these principles should be made a part of their fundamental law—and so it has remained in the Constitution of the State to this day.

In the adoption of the Federal Constitution no provision is made guaranteeing this writ. It was so deeply implanted, and so rooted in the soil of liberty, as to need no special recognition. Congress, therefore, is merely controled as to the power of suspending its privilege.

As originally adopted the Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury;" yet so great was the jealousy of the people on this subject, that they insisted upon a Bill of Rights for the purpose of securing additional protection against its invasion. This lead to the immediate adoption of the amendments, the 5th and 6th of which declared that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

Whether these provisions are applicable to the present controversy is to be resolved by an inquiry into the political status of the Southern people on the termination of the Rebellion.

The South had been indoctrinated with the theory that the Government of the United States was purely Federal; that it resulted from a *compact* between sovereign States; and that as they were originally free to accede to it, so they were equally free to secede from it whenever in their judgment its stipulations had been broken. On this ground the ordinances of secession were framed, and they proceeded to organize a new government.

The action of this Government was based upon an abso-

lute denial of this doctrine. It was maintained that the Constitution of the United States had the same obligatory force upon the people of the States as their State Constitutions. That the mode of its adoption was the same; that its direct action upon the people was the same; that to the extent of its powers it was supreme, and that the allegiance of the citizen could only be thrown off by successful revolution.

We state these propositions for the purpose of presenting the issue. We are not called on to discuss them, for as we will show they have passed from the field of forensic debate into the domain of judicial determination.

In the latest case the situation is thus described: "The ordinance of secession and all acts of the Legislature intended to give effect to it, were absolutely null; they were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the United States. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of the Rebellion, and must have become a war for conquest and subjugation." (Texas *vs.* White, 7 Wall., 726.)

By other decisions we are equally well instructed that while the Government in the exercise of its military power against persons and property in the insurgent's service, exchanged prisoners, cartels, and flags of truce, they constantly recognised a well-marked distinction between military acts adopted from motives of expediency—liable to change in time or place—and civil acts, which related to constitutional rights or duties.

While the judicial department held those engaged in the Rebellion as guilty of treason, they were practically treated by the political department as belligerents. Thus—

Walter Smith was tried before Judges Grier and Cadwallader, in October, 1861, for piracy. He plead his commission from the President of the Confederate States. This plea was rejected—he was convicted and sentenced.

The crew of the Savannah, in the same year, was tried before Judge Nelson; the same ruling was made by him. The jury disagreed-

This sentence was suspended by the President, who not contradicting the legal result applied belligerent rights—not as a matter of right, but of expediency. So those portions of territory held by the insurgents were treated for the time as de facto enemies' territory, without disparagement of its constitutional status or that of its inhabitants.—Dana's Wheaton, 297; note.

It follows from this, that as the United States never lost its sovereignty and jurisdiction, they had nothing to regain. They found the exercise of their authority impeded by a force too great to be overcome by the ordinary process of judicial tribunals, and they resorted to military force to remove the impediment. When this armed contest was over, civil authority again resumed the sceptre, and those who had been guilty of resistance to lawful authority became the proper subjects of punishment, not by the military, but by the civil tribunals of the land according to laws then in force.

These principles are very tersely stated by an eminent Judge: "No nation ever makes a conquest of its own territory. When the war was terminated the United States vindicated its original authority, and was restored to the exercise of its legitimate civil authority. No success could extend the powers of any of the Departments, since that would be not to maintain the Constitution but to subvert it." (Amy Warwick, 2 Sprague, 147.)

It is not necessary in this case to discuss the right of the people of the Southern States to representation in Con-

gress, either under constitutions which had been framed in hostility to this Government, or under those constitutions which were adopted under Executive patronage.

We admit, for the argument, that Congress had constitutional sanction to initiate in these States governments in harmony with that of the Union. But we maintain that in doing this they could not exercise the unlimited powers of war, but are restrained by the limitations and prohibitions of the Constitution; and that whatever is done beyond these must be held by the Court as *ultra vires*.

No power is conferred in more unlimited terms than that for the government of this District. It is declared to be "exclusive." But Congress, in its exercise, does not act in a character purely local, but as the legislature of the Union. This power, like all others, is conferred in this latter capacity. Strip it of this character and it does not possess it. This grant of "exclusive jurisdiction" is, then, to be taken in connection with that which declares "that this Constitution and the *laws made in pursuance thereof* shall be the supreme law of the land."

U. S. *vs.* Moore, 3 Cr., 160.

Cohens *vs.* Virginia, 6 Wheat., 424.

This limitation of power, as applicable to the clause for governing the "territories," underwent a most elaborate discussion in Scott *vs.* Sanford, 19 Howard. There were questions on which the judges were divided in opinion, but on this there was a concurrence.

The Chief Justice, speaking for the majority, held that "the power of Congress over the person or property of a citizen can never be a discretionary power under our Constitution. That the powers of the Government and the rights and privileges of the citizen are regulated and clearly defined by the Constitution itself. And when a territory becomes a part of the United States the Federal Government enters into possession, in the character impressed

upon it by those who created it. It has no power of any kind beyond it, and it cannot, when it enters a territory of the United States, put off its character and assume discretionary and despotic powers which the Constitution has denied to it. The prohibitions of the Constitution are not confined to the States, but the words are general, and extend to the whole territory."

In the dissenting opinions we find the following:

McLEAN, J.—"Did Chief Justice Marshall, in saying that Congress governed a territory by exercising the combined powers of the Federal and State governments, refer to unlimited discretion? Surely such a remark in the argument must have been inadvertently uttered. In organizing the government of a territory, Congress is limited to the means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit; so that, whether the object may be the protection of persons and property, or of communities which have been annexed to the Union by *conquest or purchase*, no more power can be exercised than is necessary. This is the limitation of all Federal powers." (542.)

CURTIS, J.—"If, then, this clause does contain a power to legislate respecting the territories, what are the limits of that power? To this I answer, that, in common with all the other powers of Congress, it finds limits in the express prohibitions not to do certain things." (614.)

It is, therefore, immaterial to the argument to insist that Mississippi is now to be considered as a *State of the Union*. If not a State in the constitutional sense, it is certainly a portion of the territory of the United States; and if the nonexistence of a legal State government justifies Congress in entering into this territory, it is solely under that clause of the Constitution which guarantees to "every State in this Union a republican form of government;" and while

a certain latitude in the choice of means is permitted, this, like all the other powers, must be exercised within constitutional rule.

This precise question, as applicable to the States lately in rebellion, was considered by the Court in Texas *vs.* White, and was thus disposed of: "These new relations imposed new duties on the United States. The first was that of suppressing the Rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National Government." "The authority for the performance of the first had been found in the *power to suppress insurrection* and carry on the war; for the performance of the second, authority was derived from the obligation of the United States to "guarantee to every State in the Union a republican form of government."

"In the exercise of this power, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be "*necessary and proper*," and that no acts be done, and no authority exerted, which is *either prohibited or unsanctioned by the Constitution.*" (727–729.)

In view of the discussions which had been previously made in the McArdle case, presenting the very question now arising under the act of 1867, we cannot regard this decision but as a *deliberate declaration of principles, fully covering and concluding the subject of this controversy in all its aspects.*

In the argument on behalf of the Government in that case, the power of Congress to organize these military commissions was asserted on the ground, that as Congress in legislating for territories "exercises (as was said in Canter's case) the combined powers of the General and of a State government," and might, as was then held, limit

the tenure of office of judges appointed for the territories, so it necessarily followed that Congress "could provide that certain crimes might be tried in the territorial courts without a jury."*

That is, because it was determined that the territorial judges did not exercise any portion of the judicial power spoken of in the 1st section of the 3d article of the Constitution, and could therefore be limited in their term of office, Congress was not restrained by the provision for jury trial to be found in the 2d section, and in the 5th and 6th articles of the amendments. But this argument for unrestrained power, though ingenious, is not novel. It was disposed of by the Court in the case of Scott *vs.* Sanford already referred to.

Commenting on the expression above quoted from the decision in Canter's case, Chief Justice Taney says: "It will be seen in reading the page in which this sentence occurs, it has no reference whatever to the powers of Congress *over rights of persons or rights of property*, but relates altogether to the power of establishing judicial tribunals, to administer the laws constitutionally passed, and defining the jurisdiction they may exercise."

Again: "The question as to what *Courts* Congress may establish in a territory to administer the laws which the Constitution authorizes it to pass, and what *laws* it is, or is not, authorized to pass, are widely different—are regulated by different and separate articles of the Constitution, and stand upon different principles."

While the power conferred on territorial Courts is thus held not to be a portion of the judicial power defined by the 1st section of the 3d article, it is still regarded as judicial power, which in virtue of the Constitution falls within the appellate jurisdiction of this Court. (Freeborn *vs.* Smith, 2 Wall., 173.)

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*Mr. Carpenter's brief, p. 41.

The appointment of judges for a term of years is not therefore to be attributed to absolute and arbitrary power. It is by virtue of the Constitution the appointment is made. It is under its judicial construction that the limitation is upheld.

We understand from the opinion of the learned Attorney General, given in a similar case from Texas, that while he admits these provisions are controlling in time of *peace*, he maintains that hostilities having once existed, the fact that they ceased years ago, and the fact that the Courts of the country are in the unobstructed exercise of their jurisdictions, cannot be made the basis of judicial determination until Congress declares these hostilities ended. In other words, that the war power may continue to be exerted at the will of Congress; and that as this power has no limit in the Constitution, Congress, under that power, had authority to authorize trials by military commissions.

As the powers claimed for Congress are so illimitable in a condition of war, it would seem to be a question of the highest interest that these powers should only be exerted when in truth and in fact that contingency exists. If Congress is limited by the Constitution to certain powers in time of peace, and may act without limitation in time of war, then the question of war or peace must be determinable by the judiciary ex certa scientia, or else there is no protection against usurpation. If the mere exercise of a war power is to be considered as its own exclusive justification, then the will of Congress, not the Constitution, is the "supreme law of the land."

This power conclusively to determine when peace takes place, is inferred from the power "to declare war." But Congress has no power to declare war against insurgents, citizens, or States—and in point of fact no such declaration was ever made.

Congress has power to declare war against a foreign State, but it cannot against a State, or any number of States of this Union, by virtue of any clause of the Constiiution; nor can the Executive, who is only authorized under the acts of 1795 and 1807 to call out the militia, and use the military force to suppress insurrection. (2 Black, 668.)

All our legislation, say the Court, during the existence of hostilities, shows that the Government proceeded not on the power to "declare war," but solely under the clause for suppressing insurrection.

In the formation of the Constitution it was proposed in the report made by Mr. Randolph, to confer on Congress the power to coerce the States in their collective capacity. Mr. Madison objected, that this would look more like a *declaration of war* than an infliction of punishment. Mr. Hamilton said, can this force be exerted? It is impossible. It would amount to *a war between the parties.* The proposition was rejected, *nem con.*

As it will be seen, the act of 1867 contains no declaration that war still exists—supposing such a declaration would be conclusive in this Court. The argument, therefore, amounts to this: A citizen complains that the act denies to him the trial by jury, as secured by the Constitution. He is answered, that this right is certainly secured to him in time of peace; but the mere fact that Congress has deprived him of it, shows that not peace but war prevails.

To help out this construction of the act, the preamble has been referred to in past discussions; but this can only be properly done for the purpose of determining the meaning of a statute, where doubtful words are used. Surely the recitals of a preamble cannot make an act constitutional, which without them would be unconstitutional.

Thus the preamble to the Constitution of the United

States cannot be resorted to, to enlarge the powers confided to the General Government or any of its departments. It cannot confer any power *per se*, it can never amount by implication to an enlargement of any power expressly given. (1 Story Com. Con., p. 327.)

But, admitting it may be referred to, we deny that its recital that there was "no legal State government" justifies the conclusion that *war powers* could therefore be exerted. It might justify those provisions of the act initiatory to the formation of a new government, but, as we have already shown, in the exercise of this portion of their power, Congress could not deny to the citizens the trial by jury, or do any other act prohibited by the Constitution.

If Congress is unrestrained in its action upon the Southern States on the ground that war still exists, is not its power equally unrestrained as to the other States? There must be two parties to a war—and when a war exists its darkening shadow covers the whole land—and if the act is to be upheld by the due exercise of the war power, why may it not be as constitutionally applicable to Massachusetts as to South Carolina?

We think we are fully authorized to deny that Congress has ever sought to place its action on any such ground. The history of the times is full of evidence, all leading to the same conclusion, that the Reconstruction Acts were passed by Congress to vindicate the authority of the Legislative Department as against the Executive, in that unhappy controversy, in which the interests of the South were tossed and sacrificed.

So far from claiming the right of instituting new governments in these States under the war power, in its nature undefinable, they claimed the power, under the specific grant of the Constitution "guaranteeing to the States a republican form of government."

Had Congress claimed the authority by virtue of a power

which it is admitted can only be exercised while war exists, *the position would have been suicidal.*

The President, as military chief, in the conduct of war, has, on well-established principles, while the war continues, the right to organize government in territory recovered from the enemy. It is *only when peace is restored* that the territory passes from the military rule, and then only can the power of Congress be exerted.

The Constitution provides for war as well as peace. In "time of peace" and "time of war" are constitutional expressions. The powers to be exercised in the one case or in the other are different, but they are all derived from it. (Milligan's case, 141.)

Peace and war, thus spoken of, are as distinct and clearly defined as water and fire, light and darkness. There is no siderial twilight in the Constitution. If, then, war power be exerted in time of peace, this is "gross usurpation." And when in any case this is alleged, the Court must necessarily ascertain the fact upon which the constitutionality of the act depends.

Thus the Constitution provides that soldiers shall not be quartered on the citizen in "time of peace." An act directing this to be done is passed by Congress. When this grievance is brought before the Judiciary, is the complainant to be told that the Court cannot inquire into the fact whether peace exists, but is bound to assume a state of war in order to uphold the constitutionality of the act?

So the act of 1863 suspended the writ of habeas corpus *during the Rebellion.* When this writ is applied for, is not the Court to judge for itself whether the suspension still continues? The fact to be ascertained is, whether the Rebellion has ended. If so, then the suspension no longer continues; and this is ascertained as any other fact in the case.

Comm. *vs.* Frank, 4 A. L. R. N. S.
Ex parte Martin, 45 Barb., 143.

Again: Under the Abandoned or Captured Property Act of March 12, 1863, it was made the duty of the supervisory agent to receive all property captured *during the war*. It was decided in August last, by the Chief Justice holding the Circuit Court for the District of South Carolina, that "actual hostilities practically terminated in May, 1865," and that the act then ceased to be operative. (McLeod *vs.* Callicot, L. T. C. Rep., 113.)

So the Non-intercourse Act of 13th July, 1861, declares that all commercial intercourse shall be unlawful as long "*as such condition of hostility should continue.*"

It was contended by the Government that the Court could not judicially know that hostilities had ceased until the President had so proclaimed it. But it was decided by Judge Trigg, in Tennessee, "that inasmuch as there was no declaration of war in domestic war, the Court would take judicial cognizance of the fact that it had ended, and the jury was instructed that if the cotton was shipped after the 25th of May, 1865, then the act had ceased to be operative by its own limitation. (Decatur cotton case.)

The rules by which the condition of war is to be decided are very clearly defined. Hale, in his History of the Common Law, says, "The exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace *when the King's courts are* open. This is declared in the Petition of Right, whereby such commissions and martial law were repealed and declared to be contrary to law."

And so this Court has said that war is well defined to be that state in which a nation prosecutes its rights by force. The *test of its existence*, as found in the sages of the common law, is this: When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the *courts of justice cannot be kept open*, then civil war exists.

As a civil war is never proclaimed *eo nomine*, its actual existence is a *fact in our domestic history which this Court is bound to notice and to know.* (Prize cases, 666–7.)

Again: "It follows from what has been said that there are occasions when martial law can be properly applied. If in foreign invasion or civil war the *Courts are actually closed*, and it is impossible to administer criminal justice, then on the *theatre of active military operations*, where *war really prevails*, there is a *necessity* to furnish a substitute for civil authority thus overthrown, and martial law is allowed to govern until the laws can have their free course. As *necessity* creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power." (Milligan's case, 127.)

"There can be no doubt," says a late writer on the Law of Nations, "that when war ceases the conquered territory ceases to be governed by the code of war. Although the military occupation may continue, the rules of its authority are essentially changed. It no longer administers the laws of war, but only those of peace. The governed are no longer subject to the severity of the military code, but are remitted to their rights, privileges, and immunities under the code civil. Hence, any laws or regulations introduced by the government, of military occupation which infringe upon the civil rights of the inhabitants, necessarily cease with the war in which they had their origin, and from which they derived their force." (Halleck, 330.)

In illustration of this principle we refer to the case of the Earl of Lancaster, whose rebellion against Edward II. was of such magnitude as to neceesitate the use of an an army of 40,000 men. The insurgents were overthrown at Boroughbridge on the Trent, Lancaster made prisoner, tried by a court martial, sentenced, and executed.

In the following reign the attainder of Lancaster was reversed by the Parliament, and it was then declared—

1st. That in time of peace no man ought to be adjudged to death for treason or other offence, without being arraigned or held to answer.

2d. That regularly when the King's courts are open, it is a time of peace in judgment of law.

3d. That no man ought to be sentenced to death by the record of the King, without his legal trial *per pares.*

(Hale's Pleas of the Crown, 499.)

The trial of Lancaster took place shortly after his capture; but the defeat of the insurgents was held to have ended the Rebellion, and the trial was illegal, because he could have been tried by his peers. In other terms, military rule is justified alone by *necessity*—and, as we have already said, this necessity "limits its duration."

In the argument on behalf of the Government, heretofore referred to, (McArdle's case,) this rule was admitted; but its *effect* was sought to be avoided by showing that from the character of the Federal Government it was *impossible to apply it.* The reason is thus stated: "When a rebellion in Russia or Austria is suppressed by the military power, victory is followed by the restoration of civil authority. Therefore, in such cases there is no *necessity*, and consequently no *right*, to establish military tribunals for civil administration. But a suppressed rebellion in our complicated system presents an anomalous case. Victory in favor of this Government is followed by a restoration of the civil authority of *this Government.* But, unlike the case in Russia or Austria, the civil authority of the United States does not extend beyond the proper subjects of Federal jurisdiction. To the preservation of the peace in a conquered State of this Union, the punishment of crimes, and the administration of justice between her citizens, the civil authority of this Government never did or can extend. This distinction, which reaches all the rights

and relations of the people, has been lost sight of in all the discussions of this subject I have seen." *

It will be noted that though the case is treated as one of *conquest*, and thus investing the victor with all the rights of a conqueror, it is still insisted that no *civil power* can be exerted. I am wholly at a loss to find any foundation for this, either in the practice or the law of nations. Our own history abundantly disproves it. We all understand the separation and distribution of powers between the Federal and State government, and that this forbids, in a *normal* condition of things, the exercise by the former of *civil authority* in the States beyond the cases designated in the Constitution. But certainly in this condition the limitation of *military power* is equally well defined; when the Federal government is restrained from interposing its civil authority, the assertion of military jurisdiction over the State would be the "grossest usurpation."

But we are now considering a condition which is *abnormal*. On this alone can rest the extraordinary power of intervention. If the right to intervene is placed upon conquest, then the will of the conqueror is the law of the conquered, whether expressed by *civil* or *military authority*.

It is worthy of remark that while one of the counsel for the Government admitted the principle that with the cessation of hostilities the civil authority resumed its omnipotence, and there was then no *right* because no *necessity* for martial law, and denied only the applicability of this rule to our own Government because it was impossible to exercise civil authority, his colleague on this very vital question differed from him *toto cœlo*.

"What, (asks Mr. Trumbull,) is the position of the United States when it has overcome this hostile State organization in the State of Mississippi? It has conquered all the powers that Mississippi had as a State, and has *possessed*

* Brief of Mr. Carpenter in McArdle's case, 65, 66.

itself as completely of all power over the inhabitants as it would have had if Mississippi had been a portion of the kingdom of Spain." (Brief, p. 18.)

We leave this contradiction arising out of the claim by conquest to say that, though it is true as contended that certain civil powers are denied to Congress, yet, the Constitution itself provides for an exceptional case when such authority may be exerted, and that exceptional case is to be found in the guarantee clause whenever the necessity for its exercise arises.

We may admit that circumstances would authorize the use of military power in the performance of this duty; but this would be merely in aid of civil authority and subordinate to it. But in all cases the Government enters into the State in vindication of its civil authority. The argument that it can exercise no other than *military power* is refuted by the very nature of the grant. The guarantee of a "republican form of government" excludes the use of means that characterize a despotism.

In concluding this branch of the subject it is only necessary to repeat, that as in an insurrection war is never declared, so when it is suppressed there is no declaration of peace. In foreign wars the cessation of hostilities is denoted by a treaty of peace; but in a rebellion there can be no treaty, for there are no competent parties to make one. It is, then, a "fact in our domestic history which the Court is bound to notice and to know."

Upon these well-recognized principles and adjudicated cases we feel authorized to assert that so much of the act of 1867, as subjects the petitioner to trial by a military commission, denies to him a right secured by the Constitution, and is therefore null and void.

PEACE DETERMINED BY THE POLITICAL DEPARTMENTS.

Assuming now the truth of the position, that the Court cannot consider peace as existing until this has been deter-

mined by the political power, we have to enter upon a dry narration of facts illustrative of the character of the power exerted during the continuance of hostilities, and of its acts and declarations touching their termination.

First, as to the Executive.

Under the authority to use the military force, whenever *in his judgment* the obstruction to the laws made it necessary, the President, on the 15th of April, 1861, (12 Stat., 1256,) proclaiming that "the laws were obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings," called for 75,000 troops.

Under the act of 13th July, 1861, authorizing him to declare, from time to time, what States were in insurrection, he issued his proclamation, 22d September, 1862, (12 Stat., 1267,) announcing "that hereafter, as well as heretofore, the war will be prosecuted for the object of restoring the constitutional relations between the United States and the people of each of the States in which that relation is, or may be suspended or disturbed," and that on the first of January he would designate the States then in rebellion.

On the 1st of January, 1863, (12 Stat., 1268,) he declared what States were to be considered as in insurrection, excepting, from the declaration, certain parishes and counties.

On 8th December, 1863, (13 Stat., 737,) pardon and restoration of property was offered, with certain exceptions, to all who had engaged in the Rebellion, upon taking a prescribed oath. It was further declared that whenever a number, not less than one-tenth of the people of a State, should establish a republican form of government, it should be recognized as the true government of the State, entitled to the constitutional guarantee.

On the 8th of July, 1864, (13 Stat., 744,) he submitted a bill passed by Congress, (not signed by him,) regarding it "as one very proper plan for the loyal people of any State

choosing to adopt it," pledging his aid to such people as soon as military resistance was suppressed.

The bill, thus referred to, declares that its provisions "are prescribed in the execution of the constitutional duty to guarantee a republican form of government to every State."

On the 13th of June, 1865, (13 Stat., 761,) a Provisional Governor was appointed for the State of Mississippi, with authority to call a convention for the adoption of a State constitution. The several departments are directed to put in force the laws respectively pertaining to them, and provision is made for opening the Courts of the United States. This proclamation is declared to be issued under the 4th section of the 4th article, which guarantees a republican form of government.

Similar action was taken on the 13th, 17th and 21st June, in reference to the other States.

On 13th June, 1865, (13 Stat., 763,) the insurrection was proclaimed suppressed in Tennessee, and all restrictions upon commerce repealed.

On the 29th August, 1865, (13 Stat., 772,) the restrictions upon articles contraband of war were removed from and after 1st September, 1865.

On 28th October, 1865, (13 Stat., 773,) a day of thanksgiving was appointed, as the country was now relieved from the fearful scourge of civil war and again enjoyed "the blessings of peace, unity, and harmony."

On the 2d April, 1866, the President proclaimed the insurrection at an end in the "States of Georgia, South Carolina, Virginia, North Carolina, Alabama, Louisiana, Arkansas, *Mississippi*, and Florida, and this is hereafter so to be regarded."

On 20th August, 1866, (14 Stat., 815,) a similar proclamation as to Texas—thus completing the number of States that had engaged in Rebellion. The proclamation thus

concludes: "And I do further proclaim that the *said insurrection is at an end, and that peace, order, tranquillity, and civil authority now exist in and throughout the whole of the United States.*"

This series is closed by the proclamation of 25th December, 1868, granting full amnesty and pardon to all who had been concerned directly or indirectly in the Rebellion, with restoration of all rights, privileges, and immunities under the Constitution and laws which have been made in pursuance thereof."

We may safely assume that these acts of the Executive will be treated by the Court with the same respect as those of the Legislative Department. The validity of either is to be tried by the same test. The question, then, is, are the proclamations of the President that the "insurrection was suppressed, and that peace, order, tranquillity, and civil authority now exist in and throughout the whole of the United States" within the scope of his constitutional power, and so authoritative? If this is answered in the affirmative, then any action of Congress founded on the assumption that war still continued must be held inoperative.

"The Executive power," says the Constitution, "shall be vested in a President of the United States of America." What those powers are is left undefined, save that he is made commander-in-chief of the army and navy, and of the militia when called into active service, and is authorized to grant reprieves and pardons; to make treaties; appoint certain officers with the consent of the Senate; to give to Congress information as to the state of the Union; to recommend such measures as he may deem expedient; to convene Congress on extraordinary occasions; to adjourn Congress in cases of disagreement between the two houses; to receive ambassadors and other public ministers; to take care that the laws be faithfully executed; and to commission all officers of the United States.

Relying alone on the powers expressly conferred by the Constitution on the Executive, we maintain that, as commander-in-chief, conducting hostilities to suppress resistance to the laws, it necessarily belonged to him to judge when hostilities were no longer necessary, and to close the contest by such means and on such terms as were necessary and proper for that purpose. We further insist that this power is also fairly conferred on him by the acts of Congress already referred to. To his judgment and discretion was intrusted the power to designate and proclaim from time to time what States or parts of States were in insurrection. This necessarily included the power to declare when the insurrection had ceased in either of the States and peace prevailed therein.

In the case cited from 45 Barb., decided as early as 1865, the Court say: "War is an anomalous condition. When peace is restored, or the necessity for military rule has terminated, the supremacy of the law is restored. The President has recalled by proclamation the suspension of the writ of habeas corpus. The restoration of this writ was a public acknowledgment by the military and civil chief of the United States that *peace is established.*"

To the same effect is the decision of the Court of Claims under the act limiting the prosecution of certain claims to two years from the *close* of the Rebellion. They hold that the President was authorized by law to decide the fact, and that the Court was therefore bound to consider the Rebellion as closed by the proclamation of 20th August, 1866. (Grossmayer *vs.* U. S., 14.)

It is not in the power of Congress to make peace even in a foreign war. When in the Convention the power "to make war" was finally altered to the form in which it now appears, it was proposed to add the power "to make peace." This was unanimously rejected, on the ground that it was not in its nature a *legislative* power, but properly belonged to the treaty-making power. (2 Story, Com. Con., § 1172.)

It would seem necessarily to follow that, as in an insurrection there can be no treaty, the cessation of hostilities and the restoration of peace are the proper subjects of Executive determination.

Second, as to the Legislative Department.

But if all this is insufficient to establish authoritatively the condition of peace, we are now, finally, to inquire how this question stands affected by the action of Congress.

From a large number of acts bearing upon the subject, we select the following:

On the 22d and 25th days of July, 1861, the House of Representatives and the Senate, by resolution, declared that "the war is not prosecuted for any purpose of conquest or subjugation, nor for the purpose of overthrowing or interfering with the rights of established institutions of those States, but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired, and *that as soon as these objects are accomplished the war ought to cease.*"

On 3d May, 1866, (14 Stat., 154,) a joint resolution was adopted expressive of the national gratitude to the soldiery "by whose valor the Rebellion has been crushed, and by whose orderly return from civil war to the peaceful pursuits of private life, the ennobling influence of our institutions has been so signally manifested."

By the act of 2d March, 1867, (14 Stat., 422,) it is provided that "section 1," of the act of 20th June, 1864, be continued in force and effect for three years from *the close of the Rebellion, as announced by the President of the United States, by proclamation dated 20th August*, 1866..

In face of this direct admission that the Rebellion *was closed*, on the 20th August, 1866, the Court is called upon to say that the Reconstruction act passed on *the same day*

in which this admission is made, is to be construed on the assumption that the Rebellion *was not closed*, and that this act shows conclusively that Congress still holds the States in the "grasp of war."

As further evidence to show that in the judgment of Congress peace and not war was the true condition of the country, we refer to the joint resolution of 1st February, 1865, (13 Stat., 567,) submitting to the States the 13th Amendment abolishing slavery.

This amendment, on 18th December, 1865, (13 Stat., 775) was declared to be ratified by twenty-seven States, being three-fourths of the thirty-six States then in the Union. Included in the twenty-seven are the States of Virginia, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina, and Georgia.

Again, on 16th June, 1866, Congress proposed to the States the adoption of the 14th amendment, and this, on the 28th July, 1868, was declared ratified by the consent of twenty-nine States, being three-fourths of the thirty-seven States then existing. Included in the twenty-nine are the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama.

The State of Mississippi, it is true, is not found among the concurring States; but it is a well known historical fact that the condition of her people was, in all respects, identical with that of the people of the States above named.

It is also true that Congress, by the act of 25th June, 1868, (p. 73,) provided for the admission of the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida; but this admission was not to occur *until* after their ratification of the 14th amendment. This took place in June and July, 1868, so the relation of Congress to these States, up to this time, was the same as that to Mississippi, and the act of 1867, if justifiable in the last named State, was equally so as to the others.

There can be no higher privilege of citizenship than participation in framing the fundamental law. When then Congress proposes to a people the exercise of this privilege, it is at once an appeal to their most deliberate and unbiassed judgment, and an acknowledgment that they are in a condition properly to respond. Those who have not the right to be protected by the Constitution, can surely have no right to make the Constitution; and we submit, that the argumeut which maintains that these States were held in the "grasp of war," when they ratified these amendments, virtually denies the validity of their action.

We have thus presented the question as to the constitutionality of the 3d section as affected by the condition of war or peace. I know of no intermediate or modified condition. Certainly there is no authority for it to be found in the Constitution. I treat the expression "the grasp of war" as figurative merely, and submit to the Court, whether Congress can exercise belligerent rights where there are no belligerents? Whether the war power can be exerted in time of peace? Whether a citizen can be deprived of trial by jury, when the civil authority is supreme and the Courts are open? Is it true that we are now in that condition that the right of prize and capture still exists? that non-intercourse acts may be enforced? that the privilege of the writ of habeas corpus may be suspended?

These are the grave questions now submitted to the consideration of this Court, which is organized by the mighty hand of the people as a barrier against encroachments on the landmarks of the Constitution. "Few men," says a great authority, "possess the firmness to resist the torrent of popular opinion, or are content to sacrifice present ease and public favor in order to earn the slow rewards of a conscientious discharge of duty—the sure but distant gratitude of the people, and the severe but enlightened

reward of posterity." Nevertheless, we find in our judicial history sure ground of confidence that in pronouncing judgment in this case, the Court will free itself from all extraneous influences and vindicate their oath "to preserve, protect, and defend the Constitution of the United States."

P. PHILLIPS,

Of Counsel for Petitioner.

WASHINGTON, D. C., *October* 1, 1869.